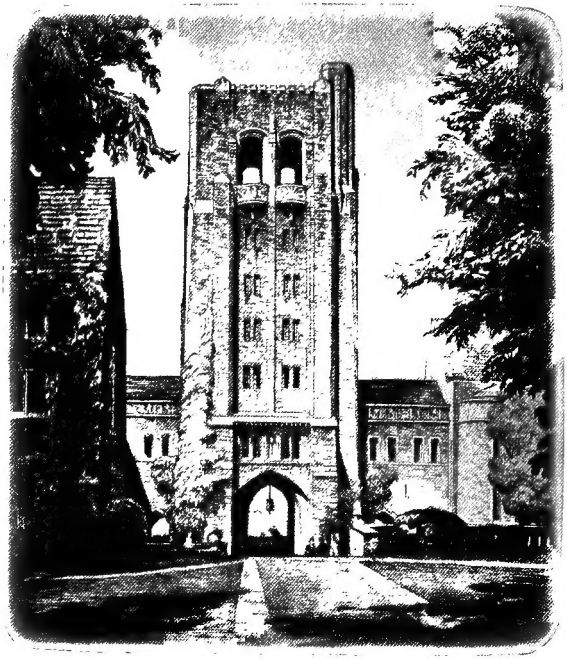
KF
695
J77
1879



Cornell Law School Library

Cornell University Library
KF 695.J77 1879
v.2
A treatise on the law of mortgages of re
3 1924 018 847 594
law





The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

http://www.archive.org/details/cu31924018847594

A TREATISE

ON THE

LAW OF MORTGAGES

OF

REAL PROPERTY.

BY

LEONARD A. JONES,

AUTHOR ALSO OF A TREATISE ON RAILROAD SECURITIES.

IN TWO VOLUMES.

VOL. II.

SECOND EDITION.

BOSTON:
HOUGHTON, OSGOOD AND COMPANY.
The Riverside Press, Cambridge.
1879.

C130261

COPYRIGHT, 1878 and 1879,
BY LEONARD A. JONES.

All rights reserved.

CAMBRIDGE:
Printed at the Riverside Press,
By H. O. Houghton and Company.

TABLE OF CONTENTS.

CHAPTER XXI.

PAYMENT AND DISCHARGE.

		SECTION
1.	Tender before and after Default	886
2.	Appropriation of Payments	904
3.	Presumption and Evidence of Payment	913
4.	Payment by Accounting as Administrator	919
5.	Changes in the Form of the Debt	924
6.	Revivor of Mortgage	943
7.	Foreclosure does not constitute Payment	950
8.	Who may receive Payment and make Discharge	956
9.	Discharge by Mistake or Fraud	966
10.	Form and Construction of Discharge	972
11.	Entry of Satisfaction of Record	989
12.	Statutory Provisions for Entering Satisfaction of Record	992

CHAPTER XXII.

REDEMPTION OF A MORTGAGE.

1.	Redemption a Necessary Incident of a Mortgage	1038
2.	Circumstances affecting Redemption	1047
3.	When Redemption may be made	1052
4.	Who may redeem	1055
5.	The Sum payable to effect Redemption	1070
6.	Contribution to redeem	1089
7.	Pleadings and Practice on Bills to redeem	1093

CHAPTER XXIII.

MORTGAGEE'S ACCOUNT.

1.	Liability to Account	1114
2.	What the Mortgagee is chargeable with	1121
3.	Allowances for Repairs and Improvements	1126
4.	Allowance for Compensation	1132
5.	Allowances for Disbursements	1134
6.	Annual Rests	1139

CHAPTER XXIV.

WHEN THE RIGHT TO REDEEM IS BARRED.

SECTION

1. The Statute of Limitations applies by Analogy 1144
2. When the Statute begins to run 1152
3. What prevents the Running of the Statute 1162

CHAPTER XXV.

WHEN THE RIGHT TO ENFORCE A MORTGAGE ACCRUES . 1174

CHAPTER XXVI.

WHEN THE RIGHT TO FORECLOSE IS BARRED . . 1192

CHAPTER XXVII.

REMEDIES FOR ENFORCING A MORTGAGE.

1. Are Concurrent 1215
2. Personal Remedy before Foreclosure 1220
3. Personal Remedy after Foreclosure 1227
4. Sale of Mortgaged Premises on Execution for Mortgage Debt . 1229
5. Remedy as affected by Bankruptcy 1231

CHAPTER XXVIII.

FORECLOSURE BY ENTRY AND POSSESSION.

1. Nature of the Remedy 1237
2. Statutory Provisions 1239
3. The Entry 1246
4. The Possession 1258
5. The Certificate of Witnesses 1259
6. The Certificate of the Mortgagor 1261
7. When the Limitation commences 1262
8. Record of the Certificate 1263
9. Effect of the Foreclosure upon the Mortgage Debt . . . 1264
10. Waiver of Entry and Foreclosure 1265

CHAPTER XXIX.

FORECLOSURE BY WRIT OF ENTRY.

1. Nature of and where used 1276
2. Who may maintain 1280
3. Against whom the Action may be brought 1290
4. The Pleadings and Evidence 1292
5. The Defences 1296
6. The Conditional Judgment 1306

CHAPTER XXX.

SECTION

STATUTORY PROVISIONS RELATING TO FORECLOSURE AND REDEMPTION 1317

CHAPTER XXXI.

THE PARTIES TO AN EQUITABLE SUIT FOR FORECLOSURE . . 1367

PART I.

Of Parties Plaintiff 1368

PART II.

Of Parties Defendant 1394

CHAPTER XXXII.

FORECLOSURE BY EQUITABLE SUIT.

1. Jurisdiction, and the Object of the Suit 1443
2. The Bill or Complaint 1451
3. The Answer and Defence 1479

CHAPTER XXXIII.

THE APPOINTMENT OF A RECEIVER.

1. When a Receiver will be appointed 1516
2. Duties and Powers of a Receiver 1535

CHAPTER XXXIV.

DECREE OF STRICT FORECLOSURE.

1. Nature and Use of this Remedy 1538
2. In what States it is used 1542
3. Pleadings and Practice 1557
4. Setting aside and opening the Foreclosure 1569

CHAPTER XXXV.

DECREE OF SALE.

1. A Substitute for Foreclosure 1571
2. The Form and Requisites of the Decree 1574
3. The Conclusiveness of the Decree 1587
4. The Amount of the Decree 1590
5. Costs 1602

CHAPTER XXXVI.

FORECLOSURE SALES UNDER DECREE OF COURT.

1. Mode and Terms of Sale 1608
2. Sale in Parcels 1616
3. Order of Sale 1620

SECTION

4. Conduct of Sale 1633
5. Confirmation of Sale 1637
6. Enforcement of Sale against the Purchaser 1642
7. The Deed, and Passing of Title 1652
8. The Delivery of Possession to Purchaser 1663
9. Setting aside of Sale 1668

CHAPTER XXXVII.

APPLICATION OF PROCEEDS OF SALE.

1. Payment of the Mortgage Debt 1682
2. Disposition of the Surplus 1684
3. Priorities, between Holders of several Notes secured . . . 1699
4. Costs of Subsequent Mortgagees 1708

CHAPTER XXXVIII.

JUDGMENT IN AN EQUITABLE SUIT FOR A DEFICIENCY . . 1709

CHAPTER XXXIX.

STATUTORY PROVISIONS RELATING TO POWER OF SALE MORTGAGES AND TRUST DEEDS.

1. Introductory 1722
2. Statutory Provisions in the Several States 1723

CHAPTER XL.

POWER OF SALE MORTGAGES AND TRUST DEEDS.

1. The Nature and Use of Powers of Sale 1764
2. The Power of Sale is a Cumulative Remedy 1773
3. Construction of Power 1777
4. Revocation or Suspension of the Power 1792
5. When the Exercise of the Power may be enjoined . . . 1801
6. Personal Notice of Sale 1821
7. Publication of Notice 1827
8. What the Notice should contain 1839
9. Sale in Parcels 1857
10. Conduct of Sale, Terms, and Adjournment 1861
11. Who may purchase at Sale under Power 1876
12. The Deed and Title 1889
13. The Affidavit 1904
14. Setting aside and waiving Sale 1906
15. Costs and Expenses 1923
16. The Surplus 1927

THE LAW OF MORTGAGES OF REAL PROPERTY.

CHAPTER XXI.

PAYMENT AND DISCHARGE.

I. Tender before and after default, 886–903
II. Appropriation of payments, 904–912.
III. Presumption and evidence of payment, 913–918.
IV. Payment by accounting as administrator, 919–923.
V. Changes in the form of the debt, 924–942.
VI. Revivor of mortgage, 943–949.
VII. Foreclosure does not constitute payment, 950–955.
VIII. Who may receive payment and make discharge, 956–965.
IX. Discharge by mistake or fraud, 966–971.
X. Form and construction of discharge, 972–988.
XI. Entry of satisfaction of record, 989–991.
XII. Statutory provisions for entering satisfaction of record, 992–1037.

1. *Tender before and after Default.*

886. At common law, payment or tender of payment at the time mentioned in the condition of the mortgage wholly discharges the incumbrance. Payment before the day named in the condition, equally with payment at the day, saves the breach of the condition and defeats the estate. In such case no written release is needed except as evidence of the facts, and to remove the apparent incumbrance from the records.[1] If a tender properly made of the sum due be refused, the mortgagor may reënter and the land is freed from the condition; the debt, however, is not discharged, but may be recovered by action.[2] Payment after the

[1] Erskine *v.* Townsend, 2 Mass. 493; Holman *v.* Bailey, 3 Met. (Mass.) 55; Merrill *v.* Chase, 3 Allen (Mass.), 339; Doody *v.* Pierce, 9 Ib. 141; Richardson *v.* Cambridge, 2 Ib. 118; and see Joslyn *v.* Wyman, 5 Ib. 62; Grover *v.* Flye, 5 Ib. 543; Crain *v.* McGoon, 86 Ill. 431.

[2] Co. Litt. 209 *b*; Martindale *v.* Smith,

day, as will presently be more fully noticed, does not produce the same result. A reconveyance is then necessary in order to revest the estate in the mortgagor. A tender is then of no avail except with reference to costs upon a bill to redeem, which is the only remedy when such tender is refused.

Where a first mortgagee before the time named in the condition took from the mortgagor an absolute deed of the property with full covenants of warranty in satisfaction of the mortgage debt, but did not formally discharge his mortgage, it was held that a second mortgagee might maintain against him a writ of entry to obtain possession and foreclosure, but could not maintain a bill in equity to redeem, because the legal title under the first mortgage was effectually divested. The debt being paid before it was due, the condition was saved, the mortgagee's estate defeated, and as effectually divested as it would have been if there had been a release from him to the mortgagor.[1] "The act of payment in the country *ante vel apud diem* saves the forfeiture of an estate held by a conveyance defeasible on a condition subsequent. No record of such an act is necessary to make the estate a fee simple estate in the grantor or mortgagor, as against all persons claiming by a subsequently acquired title." [2]

887. To revest the title by performance of the condition the performance must be substantially and formally within the terms of the condition. The estate of the mortgagee is at law defeasible only by the performance of the condition strictly in the manner and at the time stipulated. When this is done the estate reverts back to the mortgagor without any reconveyance, by the simple operation of the condition. But after a failure to comply with the exact terms of the condition, the estate is forfeited at law, and a reconveyance is necessary to restore the estate to the mortgagor. Where, therefore, the condition in a mortgage given to indemnify a surety on the mortgagor's note was that he should pay the note according to its tenor, and four days before it became due a third person, in pursuance of an arrangement made by the surety, paid the note, and took a release from the surety of his interest in the mortgage, it was held that this did not amount to

1 Q. B. 389; 1 G. & D. 1; and see Kortright *v.* Cady, 21 N. Y. 343. See § **891**.

[1] Holman *v.* Bailey, 3 Met (Mass.) 55; and see Whitcomb *v.* Simpson, 39 Me. 21.

[2] Per Chief Justice Bigelow, in Grover *v.* Flye, 5 Allen (Mass.), 543.

a payment of the note by the debtor, within the condition of the mortgage, so as to revest the title in him.[1]

The condition of a mortgage for the support of the mortgagee during life having been faithfully performed, the title upon his death revests in the mortgagor without a reconveyance.[2]

888. Payment before the day cannot be enforced by either party. When a mortgage is payable at a day certain, while on the one hand the mortgagor cannot be called upon before that day to make payment, on the other the mortgagee cannot be called upon before that day to receive payment;[3] unless, perhaps, there be tendered, in addition to the principal sum, all the interest that would accrue up to the day fixed for payment.[4] A payment before the day, if accepted by the creditor, operates as a performance of the condition equally with a payment at the day.[5] Of course a third person who has assumed the mortgage or purchased an estate subject to it has no more right than the mortgagor himself to pay off the mortgage before it is due; and the fact that the mortgagor, when he is primarily liable to pay the mortgage, has become insolvent, gives the purchaser of the estate or of a portion of it no right to pay off the mortgage.[6]

An exception to the rule that payment of a mortgage cannot be enforced until it is due by its terms occurs, also, when the parties to it have by subsequent agreement changed the time of payment to an earlier date. A mortgagor having offered a sum of money in addition to the mortgage debt to induce the mortgagee to accept immediate payment of it when it had several years to run, and having paid half of the sum at the time, and agreed to pay the rest in a few days, upon his failure to do so, the mortgagee was allowed, after tendering a release of the mortgage, to maintain an action for the balance of the amount agreed upon. The agreement having been founded upon a valid consideration, and partly performed, may be enforced in an equitable proceeding.[7]

889. Payment after condition broken. — But while payment before condition broken revests the title in the mortgagor, without reconveyance or other discharge, payment after condition

[1] Camp *v.* Smith, 5 Conn. 80.

[2] Munson *v.* Munson, 30 Conn. 425.

[3] Brown *v.* Cole, 14 Sim. 427; Abbe *v.* Goodwin, 7 Conn. 377.

[4] Hoyle *v.* Cazabat, 25 La. Ann. 438.

[5] Burgayne *v.* Spurling, Cro. Car. 283.

[6] Hoag *v.* Rathbun, 1 Clarke (N. Y.), 12.

[7] Scott *v.* Frink, 53 Barb. (N. Y.) 533.

broken does not divest the mortgagee of his legal title; and the mortgagor, if necessary, must resort to equity for a release or reconveyance. This is the doctrine of the common law, and generally prevails in those states where the common law doctrine of the nature of mortgages has not been changed by statute;[1] but in those states which have departed from the common law in this respect it is held that the acceptance of payment, after condition broken, is a waiver of the condition, and has the same effect as a performance of it. The mortgage being regarded, not as an estate in the land, but as merely a lien, the life of which depends altogether upon the debt, when this is paid the lien is in fact discharged;[2] although it is important that a discharge of the incumbrance be made upon the record.

Under this view of the nature of a mortgage, not only payment, but any act which amounts to payment and discharges the debt, discharges also the mortgage;[3] and payment of a part of the debt is a satisfaction and release of the mortgage to that extent.[4]

The rule that a discharge of the debt is a discharge of the mortgage has no application when the debt is merely discharged by the statute of limitations or by a discharge in bankruptcy.[5]

[1] Phelps *v.* Sage, 2 Day (Conn.), 151; Doton *v.* Russell, 17 Conn. 146; Cross *v.* Robinson, 21 Conn. 379; Smith *v.* Kelley, 27 Me. 237; Stewart *v.* Crosby, 50 Me. 130; Currier *v.* Gale, 9 Allen (Mass.), 522; Howard *v.* Howard, 3 Met. (Mass.) 548, 557.; Holman *v.* Bailey, Ib. 55; Maynard *v.* Hunt, 5 Pick. (Mass.) 240; Wade *v.* Howard, 11 Ib. 289; Parsons *v.* Welles, 17 Mass. 419; Howe *v.* Lewis, 14 Pick. (Mass.) 329; Crosby *v.* Leavitt, 4 Allen (Mass.), 410.

[2] Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122; Hatfield *v.* Reynolds, 34 Barb. (N. Y.) 612; Cameron *v.* Irwin, 5 Hill (N. Y.), 272; Runyan *v.* Mersereau, 11 Johns. (N. Y.) 534, 538; Jackson *v.* Crafts, 18 Ib. 110, 114; Jackson *v.* Davis, 18 Ib. 7; Rogers *v.* De Forest, 7 Paige (N. Y.), 272; Arnot *v.* Post, 6 Hill (N. Y.), 65; Hartley *v.* Tatham, 26 How. (N. Y.) Pr. 158; Farmers' Fire Ins. & Loan Co. *v.* Edwards, 26 Wend. (N. Y.) 541; 21 Ib. 467; Kortright *v.* Cady, 21 N. Y. 343; Stoddard *v.* Hart, 23 N. Y. 556; Blodgett *v.* Wadhams, Hill & Den. (N. Y.) 65; Ledyard *v.* Chapin, 6 Ind. 320; Southerin *v.* Mendum, 5 N. H. 431; Robinson *v.* Leavitt, 7 N. H. 73, 92; Swett *v.* Horn, 1 N. H. 332; Shields *v.* Lozear, 34 N. J. L. 496, per Depue, J.; Osborne *v.* Tunis, 1 Dutch. (N. J.) 633, 651; McNair *v.* Picotte, 33 Mo. 57; McMillan *v.* Richards, 9 Cal. 365; Johnson *v.* Sherman, 15 Cal. 287; Caruthers *v.* Humphrey, 12 Mich. 270; Griffin *v.* Lovell, 42 Miss. 402.

[3] Kortright *v.* Cady, 21 N. Y. 343; Sherman *v.* Sherman, 3 Ind. 337; Terrio *v.* Guidry, 5 La. Ann. 589; Le Beau *v.* Glaze, 8 Ib. 474; Schinkel *v.* Hanewinkel, 19 Ib. 260; Shields *v.* Lozear, 34 N. J. L. 496, per Depue, J.

[4] Champney *v.* Coope, 32 N. Y. 543; N. Y. Life Ins. & Trust Co. *v.* Howard, 2 Sandf. (N. Y.) Ch. 183; Briggs *v.* Seymour, 17 Wis. 255; Howard *v.* Gresham, 27 Ga. 347.

[5] Chamberlain *v.* Meeder, 16 N. H. 381; Bush *v.* Cooper, 26 Miss. 599.

A mortgage of indemnity for a part only of the amount of the mortgagee's liability is not discharged by the mortgagor's extinguishing a part of the liability, but still leaving a liability equal to the amount of the mortgage; but it continues as an indemnity until the whole debt is discharged.[1]

Under the common law where payment is made after condition broken, and there has been no release to the mortgagor, the legal title in the mortgagee, though of no value to him and but a mere naked trust without interest, is sufficient to authorize a sale of the mortgagor's equity on execution under statutes providing for a sale instead of a levy of the execution where there is a mortgage.[2] The mortgagor cannot maintain trespass *quare clausum*,[3] or a writ of entry,[4] against the mortgagee in possession. Such a title in the mortgagee is also sufficient to enable him to defend an action of ejectment.[5] But on the other hand, the title remaining in the mortgagee is not sufficient to enable him to maintain a writ of entry against the mortgagor, because under the statutes providing for such action to effect a foreclosure there must be a conditional judgment, which cannot of course be had after payment of the debt.[6]

890. Notice of payment. — It is a rule of practice in England, not supported by any positive law, except so far as custom makes law, that a mortgagee who does not demand payment when the debt becomes due, but allows it to run on, is afterwards entitled to notice from the debtor of his intention to make payment, six months in advance of the time of payment; or if such notice be not given, then he is entitled to six months' interest in lieu of the notice.[7] The reason of this rule is said to be that the mortgagor having lost his estate at law, and being only entitled to redeem in equity, must do equity, by allowing the mortgagee a reasonable time to reinvest his money.[8] The rule of course does not apply where the mortgagee himself demands

[1] Hannum *v.* Wallace, 4 Humph. (Tenn.) 143.

[2] Grover *v.* Flye, 5 Allen (Mass.), 543; Bartlett *v.* Tarbell, 12 Allen (Mass.), 123, 126; Forster *v.* Mellen, 10 Mass. 421; Stewart *v.* Crosby, 50 Me. 130; Pillsbury *v.* Smith, 25 Me. 427.

[3] Howe *v.* Lewis, 14 Pick. (Mass.) 329.

[4] Dyer *v.* Toothaker, 51 Me. 380.

[5] Smith *v.* Vincent, 15 Conn. 1.

[6] Slayton *v.* McIntyre, 11 Gray (Mass.) 271; Wade *v.* Howard, 11 Pick. (Mass.) 289, 297; Gray *v.* Jenks, 3 Mason, 520; Howard *v.* Howard, 3 Met. (Mass.) 548.

[7] Browne *v.* Lockhart, 10 Sim. 424, per Shadwell, V. C.; Bartlett *v.* Franklin, 15 W. R. 1077.

[8] Fisher on Mort. 3d ed. § 1272.

payment or takes any proceedings to enforce his demand. Neither does it apply when he comes in and proves his debt in any probate or bankruptcy proceedings;[1] nor where the security is discharged in the natural course of business without the active interference of the debtor, out of other security held for the same debt, as, for instance, by the payment of a loss upon an insurance policy. When the time of notice has expired the mortgagee is bound to know the amount due him, and to accept a proper tender of it.[2] He may, however, be justified in a qualified refusal of a tender, although it be of the proper amount, as, for instance, when it is accompanied by a deed of reassignment to be executed by him containing covenants on his part; and he is entitled to a reasonable time to be advised whether it is proper for him to execute the deed, and the draft of it should have been submitted to him beforehand. Lord Hardwicke in such a case thought a week's additional time and interest should be allowed.[3]

No such rule of practice exists in this country, though there may be local customs in regard to such notice. Provision is sometimes made in the mortgage itself, or by a separate instrument, that a certain notice shall be given by the mortgagor when the mortgage is allowed to run after its maturity.

891. At common law a tender made at the law day and refused satisfies the condition of the mortgage as fully as if payment had been made, and revests the estate in the mortgagor, who may reënter forthwith. But if the mortgage secures a debt, this subsists as a personal duty after the estate is divested by the tender, and may be recovered as a personal obligation by an action at law. If, however, the mortgage secures a gift which is not a debt, the gift is lost with the estate.[4] The discharge of this

[1] Matson *v.* Smith, 5 Jur. 645.

[2] Harmer *v.* Priestley, 16 Beav. 569; 22 L. J. N. S. Ch. 1041; Sharpnell *v.* Blake, 2 Eq. Ca. Abr. 604.

[3] Wiltshire *v.* Smith, 3 Atk. 89; Wilshaw *v.* Smith, 9 Mod. 441.

[4] Darling *v.* Chapman, 14 Mass. 101, 104; Maynard *v.* Hunt, 5 Pick. (Mass.) 240; Willard *v.* Harvey, 5 N. H. 252.

Littleton: "And note, that in all cases of a certain summe in grosse touching lands or tenements, if lawful tender be once refused, he which ought to tender the money is of this quit, and fully discharged for ever afterwards." 209 *b.*

Coke, commenting: "This is to be understood, that he that ought to tender the money is of this discharged for ever to make any other tender; but if it were a dutie before, though the feoffer enter by force of the condition, yet the debt or dutie remaineth. As if A. borroweth a hundred pound of B. and after mortgageth land to B. upon condition for payment thereof; if A. tender the money to B. and he refuseth it, A. may enter into the land,

is an accidental consequence of the tender, there being no debt or duty remaining whereon to ground an action.

892. **A tender of the amount due on a mortgage after breach of the condition** does not operate as a discharge at common law.[1] The tender must be kept good, to avail anything.[2] The appropriate office of a tender, then, is to relieve the debtor from subsequently accruing interest, to preserve the right of redemption, or to protect him from the costs of a suit to redeem. "But a tender," says Mr. Justice Depue in a recent case before the Court of Errors of New Jersey,[3] "though it is equivalent to performance, where the question is whether the party is in default, is not a satisfaction or an extinguishment of a debt. Tender of the mortgage debt on the day named is performance of the condition, and, by force of the terms of the condition, determines the estate of the mortgagee, and the condition being complied with, the land reverts to the mortgagor by the simple operation of the condition." And yet in New Jersey payment operates as an extinguishment of the mortgage debt, this being regarded as the principal and the security the accessory; and therefore whatever discharges the debt is held to discharge the security. But no reason founded on principle, declares the judge just quoted, can be assigned for giving that effect to a tender after forfeiture. "Where, as in this case," he says, "the mortgage is accompanied by a bond, to hold that a tender after default extinguished the mortgage, for the reason that after such default it remains only a security for the debt, will lead to the incongruity of giving to the tender an effect with respect to the security which, by the rules of pleading and established principles of law, the court must deny in an action on the bond, which is the immediate evidence of the debt. If the form of the instrument

and the land is freed for ever of the condition, but yet the debt remaineth, and may be recovered by action for debt. But if A. without any loane, debt, or dutie preceding, infeoffe B. of land upon condition for the payment of a hundred pounds to B. in nature of a gratuitie or gift; in that case if he tender the hundred pound to him according to the condition, and he refuseth it, B. hath no remedie thereafter, and so is our author in this and in his other cases of like nature to be understood." Sec. 338.

[1] See § 9; Currier *v.* Gale, 9 Allen (Mass.), 522; Maynard *v.* Hunt, 5 Pick. (Mass.) 240; Holman *v.* Bailey, 3 Met. (Mass.) 55; Erskine *v.* Townsend, 2 Mass. 493; Phelps *v.* Sage, 2 Day (Conn.), 151; Shields *v.* Lozear, 34 N. J. L. 496; Rowell *v.* Mitchell, 68 Me. 21; Story *v.* Krewson, 55 Ind. 397.

[2] Crain *v.* McGoon, 86 Ill. 431.

[3] In Shields *v.* Lozear, *supra*.

which evidences the debt is overlooked, and the question viewed in the aspect in which the indebtedness immediately arose, the tender does not pay or discharge the debt; and though it will avail to arrest the accruing of interest, and to free the debtor from costs, it will be deprived of that efficacy by a subsequent demand and refusal. If legal analogy is to be pursued, it could lead no further than to deprive the mortgage of operation beyond the amount due when the tender was made, leaving the question of subsequently accruing interest and costs to be raised by the subsequent demand and refusal."

893. The rule in New York and Michigan, however, is that a tender of the amount due on a mortgage after the day fixed for payment is a discharge of the lien just as much as payment is, and in the same way that a tender at common law made upon the day named in the condition for payment has this effect.[1] The lien of the mortgage is thereby *ipso facto* discharged, and the holder of the mortgage can only look to the personal responsibility of the person liable for the mortgage debt. To have this effect it is not even necessary that the money should be brought into court, or that it should be shown that the tender has ever since been kept good.[2] This view of the effect of a tender made after the law day is founded upon the departure made from the common law doctrine, that the mortgage creates an estate in fee in the mortgagee, subject to be defeated by performance of the condition; the mortgage being regarded merely as a pledge of the land of which the mortgagor remains the owner, the tender after breach of the condition is regarded as having the same result as a tender made in case of a pledge of personal property, in respect to which the rule is, that a tender and refusal at any time of the full amount of the debt extinguishes the lien of the pledge.[3]

[1] Kortright *v.* Cady, 21 N. Y. 343; reversing S. C. 23 Barb. 490; S. C. 5 Abb. (N. Y.) Pr. 358; Jackson *v.* Crafts, 18 Johns. (N. Y.) 110; Edwards *v.* Farmers' F. Ins. & Loan Co. 21 Wend. (N. Y.) 467; S. C. 26 Ib. 541; Houbie *v.* Volkening, 49 How. (N. Y.) Pr. 169; Hartley *v.* Tatham, 1 Keyes (N. Y.), 222; Bailey *v.* Metcalf, 6 N. H. 156; Robinson *v.* Leavitt, 7 N. H. 73, 93; Swett *v.* Horn, 1 N. H. 332. In New Hampshire payment after the day is provided for by statute. But in making tender the money must be brought into court.

[2] Kortright *v.* Cady, *supra;* Potts *v.* Plaisted, 30 Mich. 149; Moynahan *v.* Moore, 9 Mich. 9; Caruthers *v.* Humphrey, 12 Mich. 270; Van Husan *v.* Kanouse, 13 Mich. 303; Arnot *v.* Post, 6 Hill (N. Y.), 62; reversed in 2 Denio, 344.

[3] Comyn's Dig. tit. Mort. A.; Coggs *v.* Bernard, 2 Lord Ray. 909. per Holt,

As to the embarrassments which some judges have thought would attend the adoption of this rule,[1] Mr. Justice Davies, in the Court of Appeals of New York,[2] says: "If the mortgagor does not tender the full amount due, the lien of the mortgage is not extinguished. The mortgagee runs no risk in accepting the tender. If it is the full amount due, his mortgage lien is extinguished and his debt is paid. This is all he has a right to demand or expect, and all he can in any contingency obtain. His acceptance of the money tendered, if inadequate and less than the amount actually due, only extinguishes the lien *pro tanto*, and the mortgage remains intact for the residue. A much greater hardship might be imposed and serious injury be produced by holding that the mortgagor cannot extinguish the lien of the mortgage by a tender of the full amount due. It has never occurred to any judge to argue that a pawnee was in great peril, and in danger of losing the benefit of his pawn, by the enforcement of the well settled rule, that a tender of the amount of the loan and interest, and refusal, extinguished the lien on the pawn. Littleton well says,[3] that it shall be accounted a man's folly that he refused the money when a lawful tender of it was made to him. The only effect upon the rights of the mortgagee is, that the land or thing pledged is released from the lien, but the debt remaineth." This rule, however, has given occasion to much litigation, and sometimes to the working of great injustice.

The same distinction is taken under this rule that prevails at

C. J.; Kortright *v.* Cady, 21 N. Y. 343, per Davies, J.

The history of this doctrine in New York shows considerable shifting back and forth before it finally became settled law by the decision of Kortright *v.* Cady. It was first asserted in Jackson *v.* Crafts, 18 Johns. 110; and it is declared the decision was founded on a misapprehension of Littleton, 207 *a*, 209 *b*. It was then denied by the Chancellor in Merritt *v.* Lambert, 7 Paige, 344, and reaffirmed in the Supreme Court in Edwards *v.* Farmers' Fire Ins. & Loan Co. 21 Wend. 467, and in the Court of Errors in the same case, 26 Wend. 541; and then by the Supreme Court in Arnot *v.* Post, 6 Hill, 65; and again denied by the Court of Errors, in reversing this case, 2 Denio, 344. It was finally set at rest in Kortright *v.* Cady. The tendency since that time has been to restrict and limit the doctrine rather than to extend it. Harris *v.* Jex, 66 Barb. (N. Y.) 232; 55 N. Y. 421; Graham *v.* Linden, 50 N. Y. 547; Frost *v.* Yonkers Sav. Bank, 8 Hun (N. Y.), 26; 70 N. Y. 553.

[1] See Merritt *v.* Lambert, 7 Paige (N. Y.), 344; Edwards *v.* Farmers' F. Ins. & Loan Co. 21 Wend. (N. Y.) 467; 26 Ib. 541.

[2] Kortright *v.* Cady, 21 N. Y. 343, 353, which see for a very full and able discussion of the whole subject of the tender of a mortgage debt.

[3] Litt. 207 *a*. "Because it shall be accounted his own folly that he refused the money, when a lawful tender of it was made unto him."

common law, that when the mortgage is given to secure a debt that is not discharged by the tender, though when it secures a gift all remedy to recover the sum secured is gone. It is established by the authorities that when the only effect of the tender is to extinguish the lien, it is not necessary to follow up the tender with the averment of *touts temps prist* and with bringing the money into court;[1] but that when the tender operates to discharge the debt or sum owing, such averment and payment of money into a court is essential to a good plea of tender.[2]

But this rule is limited in its operation to defences to the enforcement of the mortgage. It does not avail a mortgagor who seeks a discharge of his mortgage; for when he seeks relief in a court of equity he must do equity, and must pay the mortgage debt. The tender then avails merely to stop the interest and not to discharge the debt.[3] Moreover, one designing to make a tender with the purpose of insisting, in case of refusal, that the mortgage lien is discharged, is bound to act in a straightforward way and distinctly and fairly make known his true purpose, without mystery or ambiguity, and allow reasonable opportunity for intelligent action by the holder of the mortgage.[4]

The mortgagor by his subsequent acts and dealings may waive his tender, and he does this by afterwards accepting a discharge, though saying at the time that he would take his own time to pay; for he thereby recognizes the mortgagee's right to demand and receive the debt.[5]

894. Questions relating to the sufficiency of tenders are perhaps of less frequent occurrence in this country than in England, chiefly for the reason that custom has there established the rule, that after the day of payment has passed the mortgagee is entitled to six months' notice of payment, or to interest for that period in lieu of notice; while here no such general rule prevails. And if there be any doubt in regard to the sufficiency of a tender

[1] Kortright *v.* Cady, 21 N. Y. 343, 354; Hunter *v.* Le Conte, 6 Cow. (N. Y.) 728.

[2] Giles *v.* Hartis, 1 Lord Ray. 254; Hume *v.* Peploe, 8 East, 168. In the latter case Lord Ellenborough, C. J., stopped the counsel who was to have argued in support of the tender, and asked if he could show any case where an averment of *touts temps prist* was holden not to be necessary in a plea of tender; saying it was expressly decided to be necessary in Giles *v.* Hartis, and was one of those landmarks in pleading that ought not to be departed from.

[3] Cowles *v.* Marble, 37 Mich. 158.

[4] Proctor *v.* Robinson, 35 Mich. 284; Frost *v.* Yonkers Savings Bank, 70 N. Y. 553.

[5] Fry *v.* Russell, 35 Mich. 229.

that has been made, there is generally no difficulty in the way of making a new tender without material loss; and proceedings for redemption may generally be commenced at any time, either with or without a previous tender.

Questions of tender, however, assume great importance in those states where the effect of the tender is wholly to discharge the mortgage lien, especially where the rule is also established that a tender may have this effect even when the tender is not kept good by a payment into court, or by constantly and at all times having the money ready to pay over.

A tender is not kept good, when after making the tender the party deposited the money to his own use in a bank, and a part of the sum was afterwards drawn out, and it was not shown that other money was kept ready to supply its place when called for.[1]

The conduct of the mortgagee may be such as to exonerate the debtor from making a tender, as, for instance, when it shows conclusively that a proper tender would not be accepted.[2] But a mere claim of more than is really due does not have this effect; because the creditor may, upon the tender being actually made, accept the amount.[3]

A tender will be without avail either to discharge the lien or to stop the running of interest, or to avoid liability for costs, unless it be for the whole amount of the mortgage debt,[4] and be made unconditionally.[5] This rule is not affected by the fact that only a portion of the amount due belongs to the holder of the mortgage, and the balance to some other person for whom he holds the mortgage in trust,[6] or that the mortgagee has received rents and profits for which he ought to account, but the amount of which has not been adjusted.[7]

A junior incumbrancer having the right to redeem may make a tender with the same effect that the mortgagor himself might make it.[8]

895. Who may make a tender. — The mortgagor not only

[1] Crain *v.* McGoon, 86 Ill. 431.

[2] Scarfe *v.* Morgan, 4 M. & W. 270; Kerford *v.* Mondel, 28 L. J. Ex. 303; Atkinson *v.* Morrissy, 3 Oregon, 332; Vaupell *v.* Woodward, 2 Sandf. (N. Y.) Ch. 143.

[3] Ashmole *v.* Wainwright, 2 Q. B. 837; Allen *v.* Smith, 12 C. B. N. S. 638.

[4] Graham *v.* Linden, 50 N. Y. 547.

[5] Sager *v.* Tupper, 35 Mich. 134.

[6] Graham *v.* Linden, *supra.*

[7] Bailey *v.* Metcalf, 6 N. H. 156.

[8] Dings *v.* Parshall, 7 Hun (N. Y.), 522; Frost *v.* Yonkers Sav. Bank, 8 Ib. 26; 70 N. Y. 553; Sager *v.* Tupper, 35 Mich. 134.

while he remains the owner of the mortgaged estate, but as well after he has sold it, has the right to pay the mortgage debt and require satisfaction;[1] and of course the debt being his he can make a good tender of payment. One who has purchased the property subject to the mortgage, and assumed the payment of it, has of course the same right, for he has thus made the debt his own. But it has been questioned whether a grantee who has merely bought the equity of redemption subject to the mortgage, without incurring any personal liability in respect to it, has the right to discharge the lien by a tender. It is claimed that he has merely a right to redeem the land.[2] "But how is the land to be redeemed from the lien of the mortgage?" asks Mr. Justice Learned in the case cited. "Not, I suppose, by a mere tender which is not kept good, but by actual payment, or by bringing the money into court for the purpose of payment. The mere owner of the equity of redemption owes no debt. It cannot be said in respect to him, as it is said in *Kortright* v. *Cady*, 'the creditor by refusing to accept does not forfeit his right to the very thing tendered, but he does lose all collateral benefits and securities.' For the creditor, if he refuses to take the money from the owner of the equity of redemption, cannot recover it from him. It is the redemption of a lien, not the payment of a debt, which his tender is to accomplish. There is no debt, at least from him, and therefore, as it seems to me, his mere tender does not discharge the mortgage lien. He has the right to redeem, but he must redeem by actual payment."

896. A tender must be made to a person authorized to receive payment. It must in general be made to the person who has the legal estate and the right to reconvey, or to enter satisfaction of the mortgage.[3] If the mortgage has been assigned, and the debtor has actual or constructive notice of the assignment, the tender, to be effectual, must be made to the assignee.[4] An agent or attorney may have authority to receive payment, although he cannot discharge the mortgage; but, on the other hand, although he may be authorized to demand payment, he may have

[1] Blim *v.* Wilson, 5 Phil. (Pa.) 78.

[2] Harris *v.* Jex, 66 Barb. (N. Y.) 232. The Court of Appeals, 55 N. Y. 421, decided the case upon another point and declined to pass upon this.

[3] See Van Buren *v.* Olmstead, 5 Paige (N. Y.), 9.

[4] Dorkray *v.* Noble, 8 Me. 278.

no authority to receive it, in which case a tender to him would not be effectual. A mortgagee having received at his residence outside the city of New York a check on a bank in the city for the amount of an instalment of interest, brought the check to the city and left it with his attorney and requested him to return it to the mortgagor. The attorney returned it by letter, stating that the mortgagee would not receive payment by check, and notifying him that unless the interest should be paid in full at once he was instructed to foreclose the mortgage. The day after the receipt of the letter, the mortgagor tendered the amount of the interest to the attorney, who then stated that he had no authority to receive the interest, and that this must be paid to the mortgagee at his residence. The tender was held to be invalid, and the principal having become due in consequence of the non-payment of the interest for a period of thirty days after it became due, the court refused to relieve him from the forfeiture.[1]

If the debtor has no knowledge that the mortgage has been assigned, he may make a tender to the mortgagee; and although the mortgage has at the time been in fact assigned, the tender, according to some authorities, would be effectual even to extinguish the lien;[2] but it would seem that if a payment to the mortgagee would not be good, a tender would not be good; and that inasmuch as the debtor, not finding the bond or note in the mortgagee's possession, is put upon inquiry as to his authority to receive payment, and is even chargeable with knowledge of fraud if he goes on and makes it, a tender to him when he had not possession of the evidence of the debt would be bad.

897. Place of payment or tender. — As a general rule, when the mortgage or the accompanying security does not appoint any place at which the principal or interest is to be paid, the debtor is bound to seek the creditor to make his payments.[3] A place of

[1] Grussy *v.* Schneider, 50 How. (N. Y.) Pr. 134.

[2] Hetzell *v.* Barber, 6 Hun (N. Y.), 534. In Reed *v.* Marble, 10 Paige (N. Y.), 409, the mortgagee had possession of the bond and mortgage as agent of his assignee, although this assignee had without his knowledge assigned them to another.

[3] Harris *v.* Mulock, 9 How. (N. Y.) Pr. 402; Smith *v.* Smith, 25 Wend. (N. Y.) 405.

Littleton, 212 *a*, saith: "And therefore it wil be a good and sure thing for him that will make such feoffment in mortgage, to appoint an especiall place where the money shall be payd, and the more speciall that it bee put, the better it is for the feoffor. As if A. infeoffe B. to have to him and to his heires, upon such condition that if A. pay to B. on the Feast of Saint Michael the Arch-Angell next coming, in the cathedrall church of St.

payment named in the deed relates in strictness to the time of payment there mentioned,[1] and afterwards a personal tender is generally necessary.

A personal tender may be excused when the mortgagee has shown by his conduct or declarations that he means to avoid a tender.[2] In *Gyles* v. *Hall*, reported by Peere Williams,[3] it appeared that on the day before the 25th of March, 1722, the mortgagor gave personal notice in writing to the defendant, the mortgagee, that he would tender the money and interest between the hours of ten and twelve in the morning, at Lincoln's Inn Hall, on the 25th of September, 1722, which was accordingly done. "Ob-

Paul's in London within foure houres next before the hour of noon of the same Feast, at the Rood loft of the Rood of the North doore within the same church, or at the tombe of saint Erkenwald, or at the doore of such a chappell, or at such a pillar, within the same church, that then it shal be lawfull to the aforesaid A. and his heirs to enter, &c.; to this case he needeth not to seek the feoffee in another place, nor to bee in any other place, but in the place comprised in the indenture, nor to bee there longer than the time specified in the same indenture, to tender or pay the money to the feoffee," &c. And Coke thereupon: "Here is good counsell and advice given, to set downe in conveyances everything in certaintie and particularitie, for certaintie is the mother of quietnesse and repose, and incertaintie the cause of variance and contentions; and for obtaining of the one, and avoiding of the other, the best meane is, in all assurances, to take counsell of learned and well experienced men, and not to trust onely without advice to a precedent. For as the rule is concerning the state of a man's bodie, *Nullum medicamentum est idem omnibus*, so in the state and assurance of a man's land, *Nullum exemplum est idem omnibus*."

[1] Sharpnell *v.* Blake, 2 Eq. Ca. Abr. 604.

[2] Manning *v.* Burges, 1 Cas. in Ch. 29.

The following is the report of a case before the Master of the Rolls in the 15th year of Charles II.: "A mortgage was forfeited; the mortgagor afterwards meeting the mortgagee, said, I have moneys, now I will come and redeem the mortgage. The mortgagee said to him, he would hold the mortgaged premises as long as he could; and then when he could hold them no longer, *let the devil take them if he would*. And afterwards the mortgagor went to the mortgagee's house with money more than sufficient to redeem the mortgage, and tendered it there; but it did not appear that the mortgagee was within or that the tender was made to him; and it was decreed a redemption, and the defendant to have no interest from the time of the tender, because of his wilfulness."

Mr. Fisher, referring to this case, but not quoting the language of it, after saying that a tender may be sufficient when made at the mortgagee's house in his absence, adds: "But this it is presumed can be only done under particular circumstances, as where the mortgagee is deliberately keeping out of the way to avoid the tender; or, as it happened in a case where there was evidence that the mortgagee had expressed a determination to hold the property as long as he could, and after that to transfer it to a particular friend of his own." Mort. 2d vol. 3d ed. 790. The gravity of Mr. Fisher's work might have been too much disturbed by placing the case and his version of it together; and so therefore the grim humor of his comment is altogether latent.

[3] 2 P. Wms. 378. The bill was to compel a reassignment of a mortgage for £1,000, and to stop the payment of interest.

jection by Solicitor General Talbot: Lincoln's Inn Hall is not named in the proviso in the mortgage deed as the place for the payment of the money, and therefore the tender must be to the person. Lord Chancellor: The money being lent in town, and after personal notice given for the payment thereof, and no objection made by the mortgagee to the place at the time of the notice, it would be very hard to make the mortgagor travel with this great sum of money to Oxford, where the mortgagee lived."

The rule was long ago established in England, that the debtor is not bound to follow his creditor beyond the four seas to make a tender. The same rule prevails in this country, the debtor not being bound to seek his creditor to make a tender beyond the limits of the state. When a mortgagee has removed from the state, and left no one within it to receive the interest and instalments as they become due, the mortgagor is relieved from any obligation to make a tender.[1]

A mortgage which provides no place of payment is presumed to be payable in the state where it was made when the parties reside in the state.[2]

898. The tender may be made at any time of the day, unless some hour has been fixed upon by agreement of the parties or by notice; in which case an attendance at any time within the hour following the time named continued to the end of the hour is sufficient.[3]

899. It is a settled rule that interest will cease to run from the time of tender, when the money really due upon the mortgage is actually and properly tendered by a person having the right to make the tender, so that the mortgagee is bound to accept it.[4] If the tender be refused, the person making the tender must keep the money continually ready to be paid over in case the mortgagee should subsequently conclude to accept it. Neither should he make any profit out of it afterwards. "It ought to appear," said the Lord Chancellor, as reported by Peere Williams in an early case,[5] "that the mortgagor from that time always kept

[1] Houbie *v.* Volkening, 49 How. (N. Y.) Pr. 169.

[2] Houbie *v.* Volkening, *supra.*

[3] Knox *v.* Simmonds, 4 Bro. C. C. 433; and see Bernard *v.* Norton, 10 L. T. N. S. 183.

[4] Columbian Building Ass'n *v.* Crump, 42 Md. 192.

[5] Gyles *v.* Hall, 2 P. Wms. 378; and the reporter says, that "if the tender be insisted on to stop interest, the money must be kept dead from that time, because the party is to be *uncore prist.*" The other

the money ready; whereas the contrary thereof being proved, that the mortgagor was not ready to pay it, therefore the interest must run on." Should the mortgagee subsequently demand the money, and find that the mortgagor was not ready with it to make payment in accordance with his previous tender, interest will run on as if no tender had been made until the money is paid or brought into court.[1]

900. The tender must be absolute and unconditional, and must be fairly made with a reasonable opportunity given to the mortgagee to ascertain the amount due him.[2] It would seem that the demand for a receipt or discharge as a condition of the tender would prevent a refusal of the tender from operating as a discharge of the lien. Certainly a condition annexed to the tender, that the holder of the mortgage should execute a quitclaim deed, or a discharge of record, or an assignment, would have that effect.[3] A requirement of a quitclaim deed is an inadmissible condition, although the holder of the mortgage, to whom the tender is made, received from the mortgagee not only an assignment of the mortgage, but a quitclaim deed of the land executed after the mortgagee had himself purchased the premises at a foreclosure sale, made by him, which had afterwards been superseded and rendered abortive by his extending the time of redemption.[4]

part of the plea, *tout temps prist*, must be understood.

[1] Columbian Building Ass'n *v.* Crump, 42 Md. 192.

[2] Potts *v.* Plaisted, 30 Mich. 149. In this case Mr. Justice Christiancy forcibly expressed the principles upon which a tender should be made, saying: "In view of the serious consequences to the holder of a mortgage, upon the refusal of a tender, — consequences which may often amount to the absolute loss of the entire debt, — and in view of the strong temptation which must exist to contrive merely colorable or sham tenders, not intended in good faith, we think the evidence should be so full, clear, and satisfactory as to leave no reasonable doubt that the tender was so made, that the holder must have understood it at the time to be a present, absolute, and unconditional tender, intended to be in full payment and extinguishment of the mortgage, and not dependent upon his first executing a receipt or discharge, or any other contingency. And the holder must, in every case, have a reasonable opportunity to look over the mortgage and accompanying papers, to calculate and ascertain the amount due; and if such papers are not present, he must be allowed a reasonable time to get them and make the calculation. He cannot be bound, under the penalty or at the hazard of losing his entire debt, to carry at all times, in his head, the precise amount due on any particular day." See, also, Roosevelt *v.* N. Y. & Harlem R. R. Co. 45 Barb. (N. Y.) 554; 30 How. Pr. 226, 230; Roosevelt *v.* Bull's Head Bank, 45 Barb. (N. Y.) 579; Storey *v.* Krewson, 55 Ind. 397.

[3] Loring *v.* Cooke, 3 Pick. (Mass.) 48, and cases cited; Frost *v.* Yonkers Sav. Bank, 8 Hun (N. Y.), 26; 70 N. Y. 553.

[4] Dodge *v.* Brewer, 31 Mich. 227.

The mortgagee is not required to determine at the time whether the tender be sufficient. He can take the sum offered, and then if he finds it sufficient he can afterwards discharge or cancel the mortgage before rendering himself liable to penalty for not doing so, or to a suit to compel a release; and if the tender prove insufficient, he need not fear either the penalty or the suit, but may himself proceed to collect the balance. He cannot justify his refusal of a tender on the ground that the debtor would not comply with the conditions upon which alone he would accept the tender, as, for instance, that the debtor should also pay another debt due him. He has no more right to make conditions of acceptance than the debtor has to make conditions of payment.[1]

901. In what money tender may be made. — A mortgage made payable in gold or silver coin of the United States may be paid in United States notes, which by law are made legal tender.[2]

The Supreme Court of the United States first decided that the Legal Tender Act, so called, was not applicable to contracts made before the passage of the act;[3] but this decision was shortly afterwards reversed.[4] In the interval between these decisions, payment of a mortgage executed previous to the passage of this act was tendered in legal tender notes of the United States, which the holder of the mortgage refused; and his refusal was justified on the ground that he could properly rely upon the decision then standing as the law of the land upon this matter, and according to which the tender was insufficient.[5]

A payment or tender in bills of a specie paying bank, current at the place of payment, has been held to be good.[6] A tender of notes or bills not a good tender in themselves may be made good by an offer to turn them forthwith into money.[7] If no objection be made at the time to the quality of the tender, but merely to the amount of it, this objection cannot afterwards be taken.[8]

A tender of Confederate treasury notes made in payment of a

[1] Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35.

[2] Rodes *v.* Bronson, 34 N. Y. 649; Kimpton *v.* Bronson, 45 Barb. (N. Y.) 618; Verges *v.* Giboney, 38 Mo. 458; Stark *v.* Coffin, 105 Mass. 328.

[3] Hepburn *v.* Griswold, 8 Wall. 603, 605.

[4] Knox *v.* Lee, 12 Wall. 457.

[5] Harris *v.* Jex, 66 Barb. (N. Y.) 232; aff. 55 N. Y. 421.

[6] Augur *v.* Winslow, 1 Clarke (N. Y.), 258; see Worthington *v.* Bicknell, 2 Har. & J. (Md.) 58.

[7] Austen *v.* Dodwell, 1 Eq. Ca. Abr. 318.

[8] Biddulph *v.* St. John, 2 Sch. & Lef. 521; Lockyer *v.* Jones, Peake, 180, n.

mortgage given in Alabama, at the time of the Southern Confederacy, and by its terms payable "in current paper funds," was held a good tender, inasmuch as such notes were current at the time, although greatly depreciated.[1]

Where there is a variance between the recital in the mortgage and the terms of the bond, the mortgage reciting a bond payable in "lawful money of the United States," but the bond calling for "lawful *silver* money of the United States," third persons relying upon the record are not affected by the omission in the mortgage, but may discharge the mortgage by a payment in lawful money of the country of any description. The question is one of lien, and this is determined by the record so far as third persons are concerned.

The recital in the mortgage gives notice of the character and amount of the debt secured; and subsequent purchasers and mortgagees are not required to seek the bond, when there is nothing vague or wanting in the reference to render such inquiry necessary. Although the bond is the principal debt in law, and governs the rights of the parties as between themselves, it does not affect others who have purchased in good faith and without notice of the variance.[2]

A legal tender of interest or principal of a mortgage cannot be made by a bank check.[3]

If the condition of the mortgage be for the performance of any other act or duty than the payment of money, as, for instance, the support of the mortgagee, a tender of performance of that act or duty will have the same effect that a tender of money has in other cases.[4]

The tender of a larger sum than is due, with a demand for change, is good if no objection be made to it on this account.[5]

The mortgage covers not merely the debt but the costs of a suit at law by the mortgagee to recover the debt or to enforce the security.[6] The costs are regarded as incident to the debt. It is the

[1] Stalworth *v.* Blum, 41 Ala. 319.

[2] Eagle Beneficial Society's App. 75 Pa. St. 226.

[3] Grussy *v.* Schneider, 50 How. (N. Y.) Pr. 134.

[4] Morrison *v.* Morrison, 4 Hun (N. Y.), 410; Carman *v.* Pultz, 21 N. Y. 547; Holmes *v.* Holmes, 9 N. Y. 525, 527; Young *v.* Hunter, 6 N. Y. 203.

[5] Black *v.* Smith, Peake, 88.

[6] Rawson *v.* Hall, 56 Me. 142; Hurd *v.* Coleman, 42 Me. 182; Hartley *v.* Tatham, 1 Keyes (N. Y.), 222. As to costs of a suit against a surety when the judgment against him was compromised, see Johnson *v.* Rice, 8 Me. 157.

debtor's neglect that renders a resort to legal process necessary, and he is not allowed to avoid the consequences of his omission to perform his contract. Therefore, after action has been commenced, either upon the debt or the security, a tender of the amount to discharge it should include costs;[1] and costs incurred in an attempt to sell the property under a power of sale, in accordance with the terms of the mortgage, must in like manner be included.[2]

902. **The person refusing a tender properly made incurs the burden of all costs** subsequently made in any proceeding to redeem or to foreclose the mortgage.[3] As already noticed, the tender proving sufficient, he sometimes incurs the risk of a complete discharge of his lien upon the property, and the consequent loss of his claim.[4] This would be prevented in some states by statutory requirements, that upon refusal of the tender, to make it effectual, the money must be brought into court; and in other states judicial rules and practice would require this, or at least that the tender be constantly kept good.

903. **Over-payment.** — When the holder of a mortgage, upon payment of it, extorts more than is actually due, and the debtor, in order to obtain a speedy discharge or to prevent foreclosure, pays the amount demanded, he may recover the over-payment as money received by the mortgagee to his use.[5]

In like manner if the mortgagee, in giving notice of foreclosure sale, makes no deduction for a payment made, and the mortgagor afterwards redeems from the sale under a statute allowing him to do so upon paying the purchase money and interest, he may recover of the mortgagee the money paid on the mortgage.[6]

2. *Appropriation of Payments.*

904. **A matter of intention.** — Payment of the debt which the mortgage was given to secure extinguishes the mortgage.[7] But to have this effect in some states, as we have already noticed, the payment must be made at the time mentioned in the condition,

[1] Marshall *v.* Wing, 50 Me. 62; Maynard *v.* Hunt, 5 Pick. (Mass.) 240; Jones *v.* Phelps, 2 Barb. (N. Y.) Ch. 440; Cox *v.* Wheeler, 7 Paige (N. Y.), 248.

[2] Allen *v.* Robbins, 7 R. I. 33.

[3] Cliff *v.* Wadsworth, 2 Y. & C. Ch. 598, 604; Columbian Building Ass'n *v.* Crump, 42 Md. 192.

[4] § 893; Marshall *v.* Wing, 50 Me. 62; Bailey *v.* Metcalf, 6 N. H. 156; Robinson *v.* Leavitt, 7 N. H. 73, 93.

[5] Close *v.* Phipps, 7 M. & G. 586; Fraser *v.* Pendlebury, 10 W. R. 104.

[6] Spottswood *v.* Herrick, 22 Minn. 548.

[7] Fisher *v.* Otis, 3 Chand. (Wis.) 83; Martineau *v.* McCollum, 4 Ib. 153.

but in others it may be made at any time afterwards; but everywhere it is the rule that the payment must be actually appropriated to that purpose, and until this be done, the condition of the mortgage being broken, the mortgagor may maintain a bill to redeem,[1] or the mortgagee may maintain a bill to foreclose.

Whether a payment be made by the debtor to his creditor who holds a mortgage upon his property, or whether an account in his favor against the creditor is to be regarded as a payment on the mortgage, or simply a debt due him from his creditor, leaving the mortgage standing as it was before, is a question of the intention of the parties, and is to be determined as a question of fact. In the absence of any agreement between the parties, express or implied, the mere existence of a debt due to the mortgagor from the mortgagee does not operate as a satisfaction of the mortgage wholly or in part, or enable him afterwards to set off such indebtedness against an assignee of the mortgage. This point is illustrated by a recent case before the Court of Appeals of New York.[2] A debtor gave his creditor a bond and mortgage to secure the exact amount of the balance of their account conditioned for the payment of sixteen thousand dollars in one year with interest. Transactions to a large amount were had between the parties for three years afterwards, in borrowing and lending money, checks, and notes, and transferring vessels; but when an account was again settled at the end of that period, the mortgagor owed the mortgagee upwards of one hundred thousand dollars. The claim was made that after the giving of the mortgage there was a balance due the mortgagor on account sufficient to pay the mortgage debt. "If such balance at any time existed," said Mr. Justice Hunt, "then the further question arises, was it the intention of the parties that the mortgage should be paid by such balance, or that it should continue as a subsisting security for the sixteen thousand dollars, independent of any balance in the current accounts? This also is a simple question of fact. If it was the intention and agreement of the parties that, as soon as a balance of sixteen thousand dollars should accrue in favor of Brown, the same should be applied in discharge of the mortgage, then the mortgage was discharged the moment such balance existed. If, on the other hand, it was the intention and agreement of the parties that

[1] Doody *v.* Pierce, 9 Allen (Mass.), 141.

[2] Peck *v.* Minot, 3 Abb. (N. Y.) App. Dec. 465; S. C. 4 Robt. 323.

the sixteen thousand dollars secured by the mortgage should remain as a permanent debt, irrespective of the balance of accounts, then it would so remain until specifically paid, whatever might be the state of accounts between the parties. Propositions more essentially questions of fact than those thus stated cannot well be imagined." The mortgagor in the mean time had accepted a release of a part of the mortgage premises, and had also given several new obligations for the interest that had accrued on the bond, and these acts were regarded as evidence of an intention to keep the mortgage subsisting.

905. A deposit of the amount of the debt may be made without appropriation, if it be agreed that the deposit shall be placed in the mortgagee's hands without in any way operating as a payment of the mortgage, or the circumstances show that the intention of the parties was that it should not so operate. This was the case where a mortgagor sold the estate, agreeing to discharge the mortgage himself, and took the purchaser's notes for the amount of the purchase money. These he delivered to the mortgagee under an arrangement that the proceeds when collected should be applied to the payment of the mortgage; but in order to stop the interest, he deposited with the mortgagee the amount of the mortgage debt, the mortgagee giving a receipt for the money and agreeing that it should not go in payment of the mortgage. The purchaser's note was not paid; but under the circumstances the mortgage remained a valid security unaffected by these transactions.[1]

906. A mortgage debtor may in the first instance appropriate a payment to whatever account he pleases, either principal or interest, or to another debt due the mortgagee.[2] This is his right in accordance with the maxim, *Quicquid solvitur, solvitur secundum modum solventis.* But when the debtor has omitted to make any specific application of the money he has paid, but has left this to the presumptions of the law or to be applied by the creditor as he may see fit, he cannot afterwards go back and make an appropriation of it himself.[3] The general payment may be

[1] Howe *v.* Lewis, 14 Pick. (Mass.) 329; and see Toll *v.* Hiller, 11 Paige (N. Y.), 228.

[2] Mills *v.* Fowkes, 5 Bing. N. C. 455; Bradley *v.* Heath, 3 Sim. 359; Hammersley *v.* Knowlys, 2 Esp. 666, per Lord Kenyon; Simson *v.* Ingham, 2 B. & C. 65, per Best, J.; Petty *v.* Dill, 53 Ala. 641.

[3] Wilkinson *v.* Sterne, 9 Mod. 427, per Lord Hardwicke; Mills *v.* Fowkes, 5 Bing. N. C. 455.

applied by the creditor to a claim against the debtor for which he has no security, or among secured claims to that for which he has the least security.[1] In an action to compel a discharge of a mortgage on the ground that certain payments made by the mortgagor were applied by him at the time upon the mortgage, when he was otherwise indebted to the mortgagee, the burden is upon the plaintiff to show such application by a preponderance of evidence.[2]

A person holding two mortgages upon the same property may apply a general payment to either or to both of them at his option. Thus if he receive the proceeds of a portion of the mortgaged estate directly from a purchaser, although the mortgagor may at the time request him to apply them towards the payment of either mortgage, if he fail to make any application the mortgagee is at liberty to apply them as he may choose.[3]

907. A payment made by a mortgage debtor has in some cases been presumed to be made upon the mortgage debt, in the absence of a particular appropriation at the time, where the creditor also has other claims against the mortgagor which are unsecured, so far at least that the mortgagee in a contest with other creditors of the mortgagor is bound to prove that the payment was made on a different account. But this presumption would not apply in case of an appropriation by either party at the time.[4] Much less can the creditor, upon receiving a payment directed by the debtor to be applied to the mortgage debt, claim the right to apply it to other claims and enforce the mortgage in full against the mortgagor.[5]

If a mortgagee release a portion of the premises to one who has purchased the equity of redemption of that portion, the money paid him for such release is deemed a payment upon the mortgage debt, and he cannot apply it in discharge of other debts due him from the mortgagor.[6]

A general payment it is said should be applied to a debt which is the personal and absolute debt of the payor rather than to one which he is not personally bound to pay, though his property be holden for it. Thus where a purchaser of an estate incum-

[1] Mackenzie *v.* Gordon, 6 Cl. & F. 892, per Lord Cottenham; Ege *v.* Watts, 55 Pa. St. 321; Prouty *v.* Price, 50 Barb. (N. Y.) 344; Niagara Bank *v.* Rosevelt, 9 Cow. (N. Y.) 409; S. C. Hopk. Ch. 574.

[2] Knox *v.* Johnston, 26 Wis. 41.

[3] Parker *v.* Green, 8 Met. (Mass.) 137.

[4] Tharp *v.* Feltz, 6 B. Mon. (Ky.) 6.

[5] N. Y. Life Ins. & Trust Co. *v.* Howard, 2 Sandf. (N. Y.) Ch. 183.

[6] Hicks *v.* Bingham, 11 Mass. 300.

bered by a mortgage has assumed a portion of the mortgage debt, and has thus made himself personally liable to the mortgagee for this part of the debt, although he may be compelled to pay the residue of the debt to save his property, he is entitled to have a general payment made by him applied to the portion of the debt for which he is personally liable.[1]

When the appropriation of credits is left to the law, the rule has sometimes been adopted that the credits will be applied most beneficially to the debtor; and therefor will be applied upon a debt secured by mortgage rather than upon a debt to the same party upon account or simple contract.[2]

By the civil law, and that of Louisiana, a general payment is imputed to the most onerous debt; and therefore, as between a mortgage debt and an open account between the same parties, the payment is applied to a mortgage debt which bears interest.[3]

908. The creditor receiving money on general account is not required to make an immediate appropriation of it, but he may apply it at any time after payment, if before the bringing of an action or the settling of an account in respect of it.[4] If the debtor become bankrupt, it would seem that the creditor might then apply a general payment to whatever liability of the bankrupt debtor he might think fit.[5] "The distinction is this," says Lord Hardwicke; "where a man is indebted by mortgage and bond, and pays money to his creditor, he must make the application, and declare to which debt he applies the money at the very time he pays it, and he cannot make the application afterwards; but his creditor may make the application any time after a general payment by his debtor, so as he does it before an account settled between them; and there have been abundance of cases upon this distinction."[6] An entry made by the debtor in his own private books is of course not conclusive of the appropriation unless he has communicated the subject of the entry to his creditor; and the creditor's entry in his own books is not conclusive upon himself until he in like manner communicates the entry or states an account. Until then he may change the appropriation as he sees fit.[7]

[1] Snyder *v.* Robinson, 35 Ind. 311.

[2] Windsor *v.* Kennedy, 52 Miss. 164.

[3] Johnson *v.* Anderson, 30 Ark. 745; Forstall *v.* Blanchard, 12 La. 1.

[4] Clayton's case, 1 Mer. 572, per Sir W. Grant.

[5] Johnson, *Exp.* 3 De G., M. & G. 236, per Lord Cranworth.

[6] Wilkinson *v.* Sterne, 9 Mod. 427.

[7] Simson *v.* Ingham, 2 B. & C. 65.

An appropriation of payments made by the parties to a prior incumbrance is binding upon subsequent incumbrancers, if the payments are made upon a legal obligation of the debtor. Although a mortgage bear interest at the rate of five per cent. per month, if the stipulation be not in violation of law, subsequent incumbrancers have no claim for relief against payments which were, by common consent of the parties to the mortgage, applied to the payment of such interest.[1] Proceeds of a sale of part of the mortgaged property made by consent of parties cannot be applied as against subsequent incumbrancers to the payment of an unsecured debt of the mortgagor.[2]

909. What is a sufficient appropriation. — The debtor's entries in his own books are not regarded as sufficient evidence of his application of a general payment.[3] It is essential that the creditor should be informed of the particular application the debtor desires to have made of the money, to make it of any effect.

Where certain notes were insufficiently secured by a mortgage, and afterwards further security was given for some of the notes separately, it was held that this special fund must be applied to the notes secured by it, to the exoneration of the mortgage, which was properly left for those having no other security.[4]

909 *a*. A mortgagee may, by agreement with a purchaser of a portion of the mortgaged premises, bind himself to apply general payments upon the mortgage debt to the discharge of the mortgage lien upon such portion. Such agreement, although without consideration, is binding upon the mortgagee as to the purchaser, after he has acted upon it and paid money to the mortgagor; but when the purchaser, being unable to complete the purchase, has reconveyed the land to the mortgagor, the contract being as to the latter without consideration, and therefore a nullity, he has no right to have payments subsequently made applied upon any particular part of the mortgaged property. The agreement in such case is for the purchaser's benefit, and not for the benefit of the mortgagor.[5]

910. When a security held as collateral for the payment of a mortgage debt is paid, *primâ facie* this is a payment upon the

[1] Mills *v.* Kellogg, 7 Minn. 469.
[2] Webster *v.* Singley, 53 Ala. 208.
[3] Manning *v.* Westerne, 2 Vern. 606; Wrout *v.* Dawes, 25 Beav. 369.
[4] Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 9.
[5] Bush *v.* Sherman, 80 Ill. 160.

principal debt.[1] But unless the debt or some part of it be due and payable, the mortgagee cannot, without the consent of the mortgagor, apply the amount received to the payment of the mortgage debt. Thus, for instance, money paid upon a policy of insurance held by the mortgagee for a loss by fire cannot be applied to the payment of the debt, if it be not due, without the consent of the mortgagor. The money received from the insurance takes the place of the property destroyed, and is still collateral until it is applied in payment by mutual consent. If the amount received be indorsed upon the note, but is afterwards applied to the restoration of the impaired security, for the benefit of all parties, the holder of a second mortgage on the property has no equity which entitles him to have the amount so received applied in reduction of the debt secured by the first mortgage. The indorsement of the money, in the first instance, upon the note, without authority, gives no such right.[2]

911. Interest to be first paid. — When payments are made by a debtor upon a mortgage, without being specially appropriated either to the principal or interest of the debt, the general rule is that the interest due shall be paid before any part of the principal is discharged.[3] If, however, there is no instalment of interest due, the payment is applied to the principal.[4]

912. Partial payments upon a usurious mortgage cannot be applied to the payment of usurious interest, even with the consent of the mortgagor, as against the existing rights of subsequent incumbrancers.[5] While a payment of a bonus upon a mortgage for an extension of the time of payment is to be regarded as a payment upon the mortgage debt, yet the law does not so apply it unless the debtor asks for such application. Therefore where interest became due after such a payment, and remaining unpaid for twenty days and more, an action was brought in pursuance of a condition of the mortgage, making the whole principal due upon such default, to foreclose the mortgage, it was held that the bonus paid for extension could not be regarded as a payment of the interest so as to prevent such forfeiture, inasmuch as no such application of it had been made or asked for previous to the suit, and

[1] Prouty *v.* Eaton, 41 Barb. (N. Y.) 409.

[2] Gordon *v.* Ware Savings Bank, 115 Mass. 588.

[3] Chase *v.* Box, Freem. Ch. 261.

[4] Davis *v.* Fargo, 1 Clarke (N. Y.), 470.

[5] Greene *v.* Tyler, 39 Pa. St. 361.

that the mortgagor's request in his answer to have it so applied could not affect the plaintiff's right of action, though the judgment should be entered for the amount of the mortgage after deducting the amount of the bonus paid.[1]

3. *Presumption and Evidence of Payment.*

913. The possession of the mortgaged note by the mortgagor or those claiming under him raises a presumption, in the absence of all other proof, that it has been paid. This presumption is one of fact and not of law, and may be rebutted by evidence accounting for the mortgagor's possession of the note, without having paid it.[2] The mortgagor's possession of the mortgage note, even after it is due, is not conclusive evidence of payment, only *primâ facie*;[3] but such possession continued for a long time and unquestioned by the mortgagee, after a full knowledge of this fact, affords a strong presumption that the debt has been paid.[4] The possession of the mortgage alone without the bond or note is held not to give rise to any presumption of payment.[5]

Where one about selling a parcel of land produced a mortgage of it with the seals torn off, and gave it to the purchaser, stating it had been paid and satisfied, and that he could have it cancelled and discharged of record, the fact that there was no receipt of payment indorsed upon it, and the further fact that the bond was not produced, were not regarded as sufficient to raise a suspicion and put the purchaser upon inquiry.[6]

One who purchases land covered by an undischarged mortgage cannot claim to be a purchaser in good faith, and without notice of the mortgagee's equities, simply because the mortgagor has possession of the notes, and exhibits them to him, if he has knowledge of facts sufficient to put a prudent man on inquiry; and especially if the mortgagee is easily accessible, and an in-

[1] Church *v.* Maloy, 9 Hun (N. Y.), 148.

[2] Levy *v.* Merrill, 52 How. (N. Y.) Pr. 360; Flower *v.* Elwood, 66 Ill. 438; Ormsby *v.* Barr, 21 Mich. 474; Richardson *v.* Cambridge, 2 Allen (Mass.), 118; Grimes *v.* Kimball, 3 Allen (Mass.), 518; Crocker *v.* Thompson, 3 Met. (Mass.) 224; Bell *v.* Woodward, 34 N. H. 90; Chapman *v.* Hunt, 18 N. J. Eq. 414; Johnson *v.* Nations, 26 Miss. 147; and see Succession of Norton, 18 La. Ann. 36; Braman *v.* Bingham, 26 N. Y. 483; Garlock *v.* Geortner, 7 Wend. (N. Y.) 198; Palmer *v.* Gurnsey, Ib. 248.

[3] Purser *v.* Anderson, 4 Edw. (N. Y.) Ch. 17; Harrison *v.* New Jersey R. & Transportation Co. 19 N. J. Eq. 488.

[4] Gardner *v.* James, 7 R. I. 396.

[5] Harrison *v.* N. J. R. & Transportation Co. 19 N. J. Eq. 488.

[6] Harrison *v.* Johnson, 18 N. J. Eq. 420.

quiry of him would have elicited the fact that the mortgage was still in force.[1]

The conduct of the mortgagee in other respects than the delivery up of the mortgage and note may be sufficient, with or without this fact, to authorize the presumption that the mortgage has been paid;[2] as, for instance, by representing to a purchaser that the mortgage is paid; or by standing by or assisting the mortgagor in making a sale of the entire estate, and leading the purchaser to suppose that payment of the mortgage has been or will be provided for, from the proceeds of the sale or otherwise.[3]

914. There is no presumption that interest has been paid unless the mortgage or the bond shows this. On the contrary, if these instruments show no entry of the payment of interest which has become due by the lapse of time, the presumption is that the interest is in default.[4]

915. Payment is presumed from lapse of time, as elsewhere illustrated, when the mortgagor has remained in possession without making any payment of either principal or interest, or doing any other act in recognition of the mortgage debt for a period of twenty years or more; or whatever may be the statute period of limitation.[5]

[1] Boxheimer *v.* Gunn, 24 Mich. 372. In considering the facts relating to the good faith of the purchase, Chief Justice Christiancy said: "Now, when a release of record would have been so much better and more certain, which the mortgagee, if the mortgage was satisfied, was bound under a heavy penalty to execute, and which, in all probability, would have cost less, why, — unless he knew or believed complainant claimed the mortgage to be still in force, and that if he applied to him for a release, facts would be developed which would show the claim to be valid, and put an end to all pretence of claim to be a purchaser in good faith and without notice, — why does he choose to employ a lawyer to examine the condition of the mortgage and description of the notes, and make an abstract of them, and give him his legal opinion that the notes being taken up, the mortgage is in effect paid? We think if he had really believed the mortgage satisfied, as between the parties to it, he would have taken the natural and direct course, and requested a discharge of record."

[2] Ormsby *v.* Barr, 21 Mich. 474.

[3] McCormick *v.* Digby, 8 Blackf. (Ind.) 99; Taylor *v.* Cole, 4 Munf. (Va.) 351.

[4] Olmsted *v.* Elder, 2 Sandf. (N. Y.) Sup. Ct. 325.

[5] See chapter xxiv. Inches *v.* Leonard, 12 Mass. 379; Chick *v.* Rollins, 44 Me. 104; Blethen *v.* Dwinal, 35 Me. 556; Cheever *v.* Perley, 11 Allen (Mass.), 584; Belmont *v.* O'Brien, 12 N. Y. 394; Dunham *v.* Minard, 4 Paige (N. Y.), 441; Collins *v.* Torry, 7 Johns. (N. Y.) 278; Jackson *v.* Hudson, 3 Ib. 375; Giles *v.* Baremore, 5 Johns. (N. Y.) Ch. 545; Jackson *v.* Delancey, 11 Johns. (N. Y.) 365; Jackson *v.* Pratt, 10 Ib. 381; Vanmaker *v.* Van Buskirk, 1 N. J. Eq. (Saxt.) 685; Evans *v.* Huffman, 5 N. J. Eq. (1 Halst.) 354. Ten years in North Carolina: Roberts *v.* Welch, 8 Ired. (N. C.) Eq. 287; Brown *v.* Becknall, 5 Jones (N. C.) Eq.

This presumption is repelled by a payment of interest or any part of the principal within that time,[1] or by any admission of the mortgagor that the mortgage debt is still due ; [2] or by a foreclosure of the mortgage, though made more than thirty years after the maturity of the mortgage.[3] The presumption of payment from lapse of time is a presumption of law, and is conclusive unless rebutted by distinct proof.[4] Possession for less than the statute period may be left to the jury, in connection with partial payments and other evidence as tending to show that the debt was fully paid ; [5] but the legal presumption does not arise at an earlier period.[6]

No presumption of payment, however, can arise from lapse of time when the mortgagee or his assignee is in possession of the land.[7] This proposition, which is undoubtedly law, was asserted by Mr. Justice Strong in the Supreme Court of the United States ; [8] but in the case decided the further facts appeared that the mortgagor became insolvent and died before the debt fell due, and the purchaser of the equity of redemption also became insolvent before the maturity of the debt, removed from the state, and never afterwards returned. All this was regarded as quite enough to repel any presumption of payment arising from lapse of time.

916. But a shorter period than twenty years may be ground for a presumption of payment when other circumstances come in to strengthen the presumption. What quality or amount of evidence of other circumstances tending to the conclusion that payment has been made is necessary to prove payment, in connection with the lapse of a long period of time, cannot be prescribed by any rule. Each case must rest upon its own circumstances. The question of presumption of payment within a less time than twenty years should be left to the jury in connection with other

423 ; Jackson *v.* Pierce, 10 Johns. (N. Y.) 414 ; Kellogg *v.* Wood, 4 Paige (N. Y.), 578 ; Owings *v.* Norwood, 2 H. & J. (Md.) 96 ; Murray *v.* Fishback, 5 B. Mon. (Ky.) 403.

[1] Howard *v.* Hildreth, 18 N. H. 105 ; Hughes *v.* Blackwell, 6 Jones (N. C.) Eq. 73 ; Wright *v.* Eaves, 10 Rich. (S. C.) Eq. 582.

[2] Frear *v.* Drinker, 8 Pa. St. 520.

[3] Jackson *v.* Slater, 5 Wend. (N. Y.) 295.

[4] Whitney *v.* French, 25 Vt. 663.

[5] Gould *v.* White, 26 N. H. 178.

[6] Peck *v.* Mallams, 10 N. Y. 509.

[7] Crooker *v.* Jewell, 31 Me. 306.

[8] Brobst *v.* Brock, 10 Wall. 519, and see cases cited.

evidence: "and in such cases," says Mr. Justice Buller,[1] "the slightest evidence is sufficient." In the same case Lord Mansfield said that there is a distinction between length of time as a bar, and where it is only evidence of it. Chief Justice Kent, in an early case in New York,[2] where no possession had been taken under a mortgage, and no interest had been paid, and no steps had been taken to enforce it for nineteen years, held that it was not an outstanding title, and that a jury might well presume it satisfied. In a recent case in Florida, under peculiar circumstances, payment was likewise presumed after a lapse of nineteen years.[3]

917. Whether a mortgage has been paid or not is a question of fact, for the determination of which any facts or circumstances relating to the matter may be considered as well as direct evidence, — and such indirect evidence is as good upon one side as upon the other, — to prove payment or to disprove it.[4] Thus, while a mortgagor for the purpose of proving payment may show that for several years after the date of the mortgage he occasionally worked for the mortgagee, the latter may rebut this evidence by showing that he was accustomed to pay all his laborers at short and stated intervals, and that the mortgagor was poor, and dependent upon his earnings for support.[5]

An indorsement on a note that a release of the trust deed, by which the note was secured, had been made and delivered by order of the holder, affords no presumption of payment when the note is produced by the payee or his representative with the indorsement cancelled by drawing a pen through the words.[6]

918. Indorsements of payments made upon the mortgage notes, whether of interest or principal, are mere admissions of payment in behalf of the maker; and parol evidence is admissible to explain them, or even to show that they were erroneously made. Such evidence may be admitted not only as against the mortgagor, but also against a purchaser of the equity, if at the time of his purchase he made no inquiry as to the amount due on the mortgage, or as to the indorsements upon the notes. But

[1] Oswald *v.* Legh, 1 T. R. 270; and see Colsell *v.* Budd, 1 Camp. 27, per Lord Ellenborough.

[2] Jackson *v.* Pratt, 10 Johns. (N. Y.) 381.

[3] Buckmaster *v.* Kelley, 15 Fla. 180.

[4] See Schafer *v.* Hartz, 56 Ind. 389; Popple *v.* Day, 123 Mass. 520.

[5] Waugh *v.* Riley, 8 Met. (Mass.) 290; and see Green *v.* Storm, 3 Sandf. (N. Y.) Ch. 305, as to offsets.

[6] Steinmetz *v.* Lang 81 Ill. 603.

a mortgagee could not stand by and allow a purchaser to buy the estate as unincumbered, and afterwards set up his mortgage against him; nor could he represent it as incumbered for a certain sum and then to set up a larger claim under his mortgage.[1]

But a receipt in full of all demands is no evidence of the discharge of a mortgage given to secure the future support of the mortgagee.[2]

4. *Payment by Accounting as Administrator.*

919. When a mortgagor comes into possession of the mortgage in a representative capacity, as, for instance, as guardian, executor, or administrator of the mortgagee, he may at any time treat the debt as paid and the mortgage discharged by charging it as paid in his probate accounts.[3] After he has done this, a subsequent assignment of the mortgage by him in his representative capacity transfers no title to the land. Before so accounting for his own mortgage and debt, he may assign them as subsisting obligations, and then he would credit the estate with the proceeds of the sale. If the mortgagor be sued upon his probate bond as guardian or administrator, and judgment be rendered for the whole amount due from him without deducting the mortgage debt, this is thereupon taken to be discharged by operation of law.[4]

But the taking of administration by a mortgagor upon the estate of the mortgagee, and his returning an inventory in which the mortgage debt due from himself is included, does not necessarily operate as payment of the debt.[5] As between the administrator and those beneficially interested in the estate, he is held to account for it as a debt paid, because he cannot sue himself or collect his own debt in any other mode than by crediting it in his administration account. But although it be a right on the part of the creditors and heirs of the mortgagee to require the administrator to credit his debt in his administration account, they may waive this right. Therefore, the administrator of a second mortgagee may, in his capacity of administrator, redeem as against the

[1] McDaniels *v.* Lapham, 21 Vt. 222.

[2] Austin *v.* Austin, 9 Vt. 420.

[3] Martin *v.* Smith, 124 Mass. 111; Ipswich Manuf. Co. *v.* Story, 5 Met. (Mass.) 310.

[4] Tarbell *v.* Parker, 101 Mass. 165; Commonwealth *v.* Gould, 118 Mass. 300.

[5] Miller *v.* Donaldson, 17 Ohio, 264; Finch *v.* Houghton, 19 Wis. 149.

assignee of a prior mortgagee who has purchased the equity of redemption.[1]

920. Although the legal position of a mortgagor, who has become the administrator of his mortgagee, does not necessarily determine whether the mortgage has been paid or not, yet **the manner in which he subsequently deals with the mortgage will determine this question.** Thus where such administrator, who was also the son of the mortgagee, after his appointment made a second mortgage of the same property with the usual covenants of warranty and against incumbrances, it was held that the mortgage of his father was thereupon discharged, and that his subsequent assignment of it was without effect.[2] In like manner when the owner of an equity of redemption, subject to a mortgage given in trust for certain heirs, is appointed their trustee, although he thereby acquires a legal title to the mortgage, it is not merged; yet if he afterwards conveys the land by deed, with covenants against incumbrance and of warranty, and he receives the purchase money, the mortgage is extinguished, unless the money is misappropriated with the knowledge of the purchaser.[3] But where at the time of the making of a second mortgage the first mortgage was in part unpaid, and stood undischarged of record, and the second mortgagee with knowledge of these facts induced the mortgagor, who was administrator of the first mortgage, to enter satisfaction of the prior mortgage, such entry did not give the junior mortgage priority.[4]

If an administrator of the mortgagor takes an assignment of a mortgage upon his intestate's estate to himself, and afterwards assigns this to another, the mortgage may be foreclosed by the assignee as a subsisting security. This is upon the ground that the mortgage was purchased by the administrator in his individual capacity from his own funds.[5]

921. The purchase by an executor of a mortgage on his

[1] Kinney *v.* Ensign, 18 Pick. (Mass.) 232; Pettee *v.* Peppard, 120 Mass. 522.

"The complainant," said Chief Justice Shaw, "is in a situation to do just what any other administrator would do, as if he were not himself the original mortgagor. On redemption he will be put into possession of the estate; but he will hold it in *autre droit;* his seisin and possession will be according to his title, and that will be, and will appear by the record to be, in his representative capacity."

[2] Ritchie *v.* Williams, 11 Mass. 50.

[3] Hadley *v.* Chapin, 11 Paige (N. Y.), 245; Pettee *v.* Peppard, 120 Mass. 522.

[4] Remann *v.* Buckmaster, 85 Ill. 403.

[5] De Forest *v.* Hough, 13 Conn. 472.

testator's estate, and the assignment of it to a person to hold for the executor, does not operate as a discharge of the mortgage, if the executor made the purchase with his own personal funds, without intending it as a payment of the mortgage, or to use it for his own benefit to the disadvantage of the trust estate;[1] and in such a case, though the executor receive from the testator's estate money more than enough to pay off the mortgage, but he applies it partly to paying off other debts, the testator's devisees, in an action against them to recover the mortgaged premises, cannot sustain a defence of payment on the ground of the conduct of the executor, without showing affirmatively that the executor received money from the estate which he might have applied in discharge of the mortgage debt, and did not in fact apply it to the discharge of other debts.[2]

In like manner a purchase by an executor of the first mortgagee, at a sale of the mortgaged property under a second mortgage, does not operate as a merger or extinguishment of the first mortgage, unless it was so intended by the purchaser; and if the purchase be made in his own right, with his own funds, an intention that it should not so operate is manifest.[3]

Upon the same principle where the trustees under a mortgage of a railroad company purchased a portion of the land embraced in the mortgage, at a sale under a decree of foreclosure obtained upon a prior mortgage, the purchase being made in their individual right, it cannot be treated as a payment of the mortgage by them.[4]

922. And so, on the other hand, if the mortgagee be appointed administrator of the estate of the original debtor, the mortgage is not extinguished unless assets come into his hands which can be applied in payment of the debt.[5]

If an executor or administrator discharge a mortgage belonging to the estate he is administering, upon a consideration moving only to him personally and not to the estate, although the mortgagor know this, the release is not void, but voidable only; and if parties in interest seek to enforce the mortgage as a subsisting security, they must first have the release set aside.[6]

923. Bond by heir to pay the debt. — When an heir, to pre-

[1] Stillman *v.* Stillman, 21 N. J. Eq. 126.
[2] Sanderson *v.* Edwards, 111 Mass. 335.
[3] Clift *v.* White, 12 N. Y. 519.
[4] Griggs *v.* Detroit, &c. R. R. Co. 10 Mich. 117.
[5] Bemis *v.* Call, 10 Allen (Mass.), 512.
[6] Weir *v.* Mosher, 19 Wis. 311.

vent a sale of mortgaged land, gives a bond for the payment of the debt and takes an assignment of the mortgage, the mortgage in some cases has been held to be discharged,[1] and in others to remain a subsisting security.

5. *Changes in the Form of the Debt.*

924. No change in the form of indebtedness or in the mode or time of payment will discharge the mortgage. A mortgage secures a debt, and not the note, or bond, or other evidence of it. No change in the form of the evidence, or the mode or time of payment, — nothing short of *actual payment of the debt*, or an express release, — will operate to discharge the mortgage. The mortgage remains a lien until the debt it was given to secure is satisfied, and is not affected by a change of the note, or by giving a different instrument as evidence of the debt, or by a judgment at law on the note merging the original evidence of indebtedness, or by a recognizance of record taken in lieu of the mortgage note.[2]

[1] See § 866; Robinson *v.* Leavitt, 7 N. H. 73.

[2] Taber *v.* Hamlin, 97 Mass. 489, 492; Watkins *v.* Hill, 8 Pick. (Mass.) 522; Pomroy *v.* Rice, 16 Ib. 22; Baxter *v.* M'Intire, 13 Gray (Mass.), 171; Osborne *v.* Benson, 5 Mason, 157; Swan *v.* Yaplé, 35 Iowa, 248; Port *v.* Robbins, 35 Iowa, 208; State *v.* Lake, 17 Iowa, 215; Jordan *v.* Smith, 30 Iowa, 500; Chase *v.* Abbott, 20 Iowa, 154; Sloan *v.* Rice, 41 Iowa, 465; Hendershott *v.* Ping, 24 Iowa, 134; Morse *v.* Clayton, 13 S. & M. (Miss.) 375; McCormick *v.* Digby, 8 Blackf. (Ind.) 99; Hugunin *v.* Starkweather, 5 Gilm. (Ill.) 492; Seymour *v.* Darrow, 31 Vt. 122; Dana *v.* Binney, 7 Vt. 493; McDonald *v.* McDonald, 16 Vt. 630; Dunshee *v.* Parmelee, 19 Vt. 172; Slocum *v.* Catlin, 22 Vt. 137; Flower *v.* Elwood, 66 Ill. 438; Hamilton *v.* Quimby, 46 Ill. 91; Wayman *v.* Cochrane, 35 Ill. 155; Elliott *v.* Blair, 47 Ill. 343; Rogers *v.* Trustees of Schools, 46 Ill. 428; Babcock *v.* Morse, 19 Barb. (N. Y.) 140; Bank of Utica *v.* Finch, 3 Barb. (N. Y.) Ch. 293; Rogers *v.* Traders Ins. Co. 6 Paige (N. Y.), 583; Hill *v.* Beebe, 13 N. Y. 556; Gregory *v.* Thomas, 20 Wend. (N. Y.) 17; Cole *v.* Sackett, 1 Hill (N. Y.), 516; Franklin *v.* Cannon, 1 Root (Conn.), 500; Bolles *v.* Chauncey, 8 Conn. 389; Elliot *v.* Sleeper, 2 N. H. 525; Hadlock *v.* Bulfinch, 31 Me. 246; Parkhurst *v.* Cumnings, 56 Me. 155; Smith *v.* Stanley, 37 Me. 11; Cullum *v.* Branch Bank of Mobile, 23 Ala. 797; Christian *v.* Newberry, 61 Mo. 446; Lippold *v.* Held, 58 Mo. 213; Thornton *v.* Irwin, 43 Mo. 153; Williams *v.* Starr, 5 Wis. 534; Heard *v.* Evans, 1 Freem. (Miss.) Ch. 79; Whittaker *v.* Dick, 5 How. (Mass.) 296; Terry *v.* Woods, 14 Miss. 139; Gleason *v.* Wright, 53 Miss. 247; Burton *v.* Pressly, 1 Cheves (S. C.), 1; Farmers' Bank *v.* Mutual, &c. Society, 4 Leigh (Va.), 69; Cissna *v.* Haines, 18 Ind. 496; Ames *v.* N. O., Mobile & Tex. R. R. Co. 2 Woods, 206.

In Flower *v.* Elwood, 66 Ill. 438, Mr. Justice Walker stated this general principle as follows: "As a general rule, the mere change in the form of the debt does not satisfy a mortgage given to secure it, unless it is intended so to operate. The lien of the debt attaches to the mortgaged property, and the lien can, as between the parties, only be destroyed by the payment

This rule as applied to a renewal of the note holds equally in those states where a negotiable note is held to be, *primâ facie*, payment of the debt for which it was given.[1] In Massachusetts, where this rule prevails, it is subject to qualification, and may be rebutted and controlled by evidence or admitted facts. "And it has been uniformly held," says Mr. Justice Endicott, "that the presumption of payment is controlled where its effect would be to deprive the party who takes the note of his collateral security, or any other substantial benefit." [2]

This presumption may also be rebutted by parol evidence of an agreement to the contrary made by the parties.[3]

925. A new note is not a discharge as against a subsequent purchaser, unless it is so as to the mortgagor. As a general rule a purchaser from a mortgagor or a subsequent incumbrancer cannot claim that a new note for the whole or any part of the mortgage debt operates as a payment, unless the facts are such that the mortgagor himself could make this claim. The mortgagee's security cannot be affected by any dealings of the mortgagor with other persons.[4] Of course if the mortgagee by his acts or declarations leads another who is about to become interested in the property to suppose that the amount for which a new note has been taken is actually paid, and is no longer covered by the mortgage, he is estopped to claim that as to such person the new note was not a discharge of the mortgage debt. A second mortgage and note taken for the same debt without a surrender and discharge of the first mortgage and note is presumably a further security for the same debt, and not a substitution for that.[5]

Where a new mortgage and note are taken by a mortgagee from a purchaser of a mortgaged estate, under an agreement with the mortgagor that the original mortgage should not be enforced,

or discharge of the debt, or by a release of the mortgage. Mere change of the form of the evidence of the debt in nowise affects the lien. A renewal of the note, its reduction to a judgment, or other change not intended to operate as a discharge of the lien, still leaves it, as between the parties, in full vigor. This is a rule in equity that is sanctioned by many adjudged cases. In that forum mere form is disregarded, and the substance only is considered."

[1] Watkins *v.* Hill, 8 Pick. (Mass.) 522; Pomroy *v.* Rice, 16 Ib. 22; Bank of S. C. *v.* Rose, 1 Strob. (S. C.) Eq. 257; Dunshee *v.* Parmelee, 19 Vt. 172; M'Donald *v.* M'Donald, 16 Vt. 630; Bolles *v.* Chauncey, 8 Conn. 389.

[2] Parham Sewing Mach. Co. *v.* Brock, 113 Mass. 194; and see Worthy *v.* Warner, 119 Mass. 550.

[3] Langley *v.* Bartlett, 33 Me. 477.

[4] Robinson *v.* Urquhart, 1 Beas. (N. J.) 515; Strachn *v.* Foss, 42 N. H. 43.

[5] Schumpert *v.* Dillard, 55 Miss. 348, 364.

if the property included in the new mortgage should prove sufficient for the purpose, the mortgagee having neglected to record the new mortgage for a long time, and by his laches lost the benefit of it by the intervention of other incumbrances, when the property itself was sufficient, he was held to have lost the right to enforce the original mortgage.[1]

926. Intention generally controls. — Whether a new note shall be treated, and have effect between the parties, as a payment of a former one for which it is substituted, will depend upon the purpose and understanding of the parties to the transaction. But not only will the intention of the parties be determined by the express agreement of the parties,[2] but in the absence of this, by the circumstances attending the transaction from which such intention may be inferred.[3] The assent of the mortgagor that the lien of the mortgage shall continue will have that effect as against him, even when the mortgagee so conducts the business as to discharge the lien as against other parties interested.[4] In the absence of any express agreement, and of any circumstances showing intention, the renewal of the note does not affect the security.[5] The burden is upon the mortgagor to show the existence of an agreement that the mortgage lien should be released upon the execution of the new note; and not upon the mortgagee to show an agreement that the mortgage should continue as a security for the debt covered by the new note.[6]

It is of course competent for the parties to agree that a change in the form of the mortgage debt shall operate as a payment of the debt, although the mortgage be not cancelled in form. Such, also, will be the effect of the substitution of a new security for the old, when the circumstances of the transaction indicate an

[1] Teaff *v.* Ross, 1 Ohio St. 469.

[2] Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602, 614; 11 Chicago L. N. 31.

[3] Grimes *v.* Kimball, 3 Allen (Mass.), 518; Taft *v.* Boyd, 13 Ib. 84; Watkins *v.* Hill, 8 Pick. (Mass.) 522; Pomroy *v.* Rice, 16 Ib. 22; Hoag *v.* Starr, 69 Ill. 365; Flower *v.* Elwood, 66 Ill. 438; Lippold *v.* Held, 58 Mo. 213; McDonald *v.* Hulse, 16 Mo. 503; Birrell *v.* Schie, 9 Cal. 104; and see Howell *v.* Bush, 54 Miss. 437.

[4] McConihe *v.* McClurg, 18 Wis. 637.

[5] Cullum *v.* Branch Bank of Mobile, 23 Ala. 797.

[6] Sloan *v.* Rice, 41 Iowa, 465. In a recent case in Illinois, however, the taking of a new note by a mortgagee, payable in two years without interest, after the institution of proceedings in bankruptcy against the maker, under a composition agreement entered into by all the creditors of the maker, was held by a majority of the court to operate as a release of the mortgage. Jarnagan *v.* Gaines, 84 Ill. 203.

intention or understanding that the original debt shall be paid. The question of an intention in such cases always comes in with controlling force; and the intention may operate as well to extinguish the debt as to keep it alive. If a new note be taken with the intention that it shall operate as payment in whole or in part of the old debt, then the mortgage is accordingly paid wholly or in part as the case may be. Thus where a mortgage was given as security for a note payable in instalments, and after the first instalment had become due the mortgagee called on the mortgagor for payment, saying he could sell the note and mortgage if that instalment were paid; the mortgagor thereupon gave a note payable in four months for the amount due, upon which the mortgagee obtained a discount at a bank; and the following indorsement was at the same time made on the mortgage note: "Received the first instalment on the within, of $402.78." The mortgagee thereupon assigned the mortgage and the original note. Before the maturity of the new note the mortgagor failed, and it was paid by the mortgagee who indorsed it. Chief Justice Shaw, delivering the opinion of the court,[1] said: "The indorsement on the note of a receipt of payment of the first instalment is *primâ facie* evidence of payment; and the other facts agreed confirm, instead of rebutting, this presumption. Payment by a negotiable note shall operate as a discharge and extinguishment of a prior debt when so intended by the parties. The rule of this commonwealth differs from that of the common law, only in determining what shall be presumed to be the intent of the parties, from the fact of giving and accepting a negotiable note for a simple contract debt. Without further evidence of intent we construe it to be payment, but the common law deems it collateral security. But this presumption may be controlled by other evidence, and when ascertained such intent shall govern."

The question of intention in these cases as well as in others is one for the jury. It is one of fact. Considerations of the effect of regarding the transaction as a payment upon the rights and interests of the parties may properly be urged as reasons why it should or should not be so considered.[2]

927. The taking up of the mortgage note and the substitution of another is not a discharge of the original debt either

[1] Fowler *v.* Bush, 21 Pick. (Mass.) 230. Couch *v.* Stevens, 37 N. H. 169; Hodgman *v.* Hitchcock, 15 Vt. 374.

[2] Collamer *v.* Langdon, 29 Vt. 32;

as between the parties or as to a subsequent purchaser. Even where the purchaser finds the mortgage note in the hands of the mortgagor, the mortgage remaining unsatisfied of record, he has no right to presume that it was satisfied. The mortgage is sufficient to put him upon inquiry.[1] Upon making a partial payment of the mortgage debt, the mortgagee may give up the old note and take a new one for the balance remaining unpaid; and the transaction does not impair or defeat the mortgage.[2] In like manner the original mortgage notes may be given up and in lieu of them an agreement made that the mortgagor shall pay the amount of the notes upon an indebtedness of the mortgagee for the same land, without in any way discharging the mortgage security;[3] and it would seem that the agreement might just as well be for the payment of any debt of the mortgagee to the amount of the mortgage debt.

When a mortgage is discharged and a new one taken as part of one transaction, the seisin between the release and the new mortgage is but momentary, and will not admit any right or interest of the mortgagor under the homestead act to intervene;[4] nor would such a seisin give his wife a right of dower. But as regards intervening liens of third persons, a release of the original mortgage and the taking of a new one would naturally let them into a position of priority to the new mortgage, and it would require very clear evidence of fraud to induce a court of equity to interfere to prevent this result.[5]

When the original mortgage is left undischarged upon the taking of the second mortgage, in the absence of an express agreement that the latter is received in satisfaction of the former, for stronger reasons the original mortgage remains as a security for the original debt.[6] If the new note and mortgage secure an additional amount, this fact shows a motive for the transaction, but

[1] See § 355; Bolles *v.* Chauncey, 8 Conn. 389.

[2] Chase *v.* Abbott, 20 Iowa, 154.

[3] Hugunin *v.* Starkweather, 10 Ill. (5 Gilm.) 492. See Tucker *v.* Alger, 30 Mich. 67.

[4] Burns *v.* Thayer, 101 Mass. 426; Dillon *v.* Byrne, 5 Cal. 455; Swift *v.* Kraemer, 13 Cal. 526. Intention as shown by the transaction will govern. Howell *v.* Bush, 54 Miss. 437.

[5] Dingman *v.* Randall, 13 Cal. 512. See, however, Packard *v.* Kingman, 11 Iowa, 219, where an intervening landlord's lien was postponed; Lasselle *v.* Barnett, 1 Blackf. (Ind.) 150; Stearns *v.* Grodfrey, 16 Me. 158; United States *v.* Crookshank, 1 Edw. (N. Y.) 233. See, however, § 971.

[6] Gregory *v.* Thomas, 20 Wend. (N. Y.) 17; Christian *v.* Newberry, 61 Mo. 446; Burdett *v.* Clay, 8 B. Mon. (Ky.) 287, 296.

it has no tendency to show that the prior security was extinguished.[1]

928. **The giving up of the bond of defeasance** executed at the time of the deed of the land and constituting with it a mortgage, and the taking of a new bond at a subsequent date, do not defeat the transaction as a security for the original loan.[2]

929. **The taking of further security for the mortgage debt,** whether it be by a second mortgage upon the same land or real or personal security upon other property, is generally no waiver of the original mortgage.[3] Neither does the taking of a new note with an indorser where there was none originally, nor the taking of a new note without an indorser in place of an old one secured by an indorsement, release the premises from the lien.[4] Nor does the renewal of the note with different names have this effect;[5] nor the giving of the new note different from the old by making it payable at a certain place;[6] nor the giving of the new note at the request of the holder of the old to one to whom it was intended the security should be assigned, such delivery to the intended assignee amounting in fact to an assignment of the debt.[7] The taking of a new bond and mortgage for the amount of taxes and assessments paid by the mortgagee on the mortgaged property does not of itself prevent his claiming the same under the lien of the first mortgage, or as incident to that lien.[8] Of course if further security be taken for part of a mortgage debt, with the intention and mutual understanding of the parties that such part shall be withdrawn from the operation of the mortgage, it will have this effect.[9]

930. **The incorporating in the new note of an additional sum** loaned will not, in the absence of an agreement to the contrary, discharge the mortgage as between the parties; and parol

[1] Hill *v.* Beebe, 13 N. Y. 556; but see Iowa County *v.* Foster (Iowa, 1879), 13 West. Jur. 36.

[2] See § 252; Judd *v.* Flint, 4 Gray (Mass.), 557; Tennery *v.* Nicholson, 87 Ill. 464.

[3] Flower *v.* Elwood, 66 Ill. 438; Burdett *v.* Clay, 8 B. Mon. (Ky.) 287, 296; Gregory *v.* Thomas, 20 Wend. (N. Y.) 17; Byers *v.* Fowler, 14 Ark. 86; Cissna *v.* Haines, 18 Ind. 496; and see Bank of England *v.* Tarleton, 23 Miss. 173.

[4] Darst *v.* Bates, 51 Ill. 439; N. H. Bank *v.* Willard, 10 N. H. 210.

[5] Pond *v.* Clarke, 14 Conn. 334.

[6] Whittaker *v.* Dick, 5 How. (Miss.) 296.

[7] Burdett *v.* Clay, 8 B. Mon. (Ky.) 287; Christian *v.* Newberry, 61 Mo. 446, 451.

[8] Eagle Fire Ins. Co. *v.* Pell, 2 Edw. (N. Y.) Ch. 631.

[9] Boston Iron Co. *v.* King, 2 Cush. (Mass.) 400.

evidence is admissible to show that at the time the new note was given it was agreed that the mortgage should continue as security for it.[1] And where the note had been increased, diminished, and renewed several times it was held that the mortgage securing it was still a valid security for the amount remaining due upon it, even as against third persons.[2] Especially when the mortgage by its terms is given to secure notes made for the accommodation of the mortgagor and renewals of those notes from time to time, until they should all be paid, it is not necessary to constitute the notes subsequently issued, renewals, that they should be for the same amounts, or for the same periods, or that each successive note should have been applied to take up its immediate predecessor. A continuing loan of the same credit would be within the terms of the mortgage.[3]

931. But if a new note for a different amount, payable at another date, be given in place of one of several notes secured by the mortgage without any agreement that it shall be secured by the mortgage, the holder loses his right to the security as against the holder of other notes secured by the mortgage.[4]

932. The taking of a new note for the interest accrued upon a mortgage debt does not generally remove this part of the debt from the security of the mortgage.[5] The indorsement of the amount for which the new note is taken upon the original mortgage note does not have the effect of a payment even as against subsequent incumbrancers,[6] unless their dealings with the mortgagor were based upon a knowledge of such indorsement, and a belief that such amount had been paid.

Where a note was given for the amount of interest accrued on a mortgage, together with a further loan made at that time, and an indorsement was made on the mortgage note, "Received on the within, interest up to date," and there was evidence that the note was intended by the parties to be taken in payment of the

[1] Port *v.* Robbins, 35 Iowa, 208; Goenen *v.* Schroeder, 18 Minn. 66; De Cottes *v.* Jeffers, 7 Fla. 284; new note including interest accrued, Pomroy *v.* Rice, 16 Pick. (Mass.) 22; Ellsworth *v.* Mitchell, 31 Me. 247.

[2] Brinckerhoff *v.* Lansing, 4 Johns. (N. Y.) Ch. 65.

[3] Gault *v.* McGrath, 32 Pa. St. 392.

[4] Wilhelmi *v.* Leonard, 13 Iowa, 330. See Tucker *v.* Alger, 30 Mich. 67.

[5] Elliot *v.* Sleeper, 2 N. H. 525; Parkhurst *v.* Cummings, 56 Me. 155; Tylee *v.* Yates, 3 Barb. (N. Y.) 222; Rice *v.* Dewey, 54 Barb. (N. Y.) 455.

[6] Calkins *v.* Lockwood, 16 Conn. 276.

interest, it was held that such interest was no longer secured by the mortgage.[1]

933. A new note given for the balance found due on a mortgage is not invalid for want of consideration, although the old note be not given up,[2] but is left with the mortgagee as collateral to the new note. The extension of the time of payment is a sufficient consideration to uphold the new note.

934. A mortgage of indemnity is generally held to cover successive renewals of the note for which the indemnity was taken.[3] Nor does it make any difference that the renewed note has different names upon it, or is for a different amount; so long as the mortgagee remains liable for the debt he was indemnified against, he may, upon being compelled to pay it, rely upon the protection of the mortgage.[4] Nor is it material that the renewal note is for a larger amount, but signed and indorsed as the first one was;[5] or that there are successive renewals.[6]

When the surety does not become liable upon the new note, but this is taken with other sureties, and the old is taken up, the condition of the surety's mortgage is saved, and consequently no interest remains in him which he can pass by assignment.[7]

935. If a payment be made upon a mortgage by check or bill of exchange which is not paid, although an indorsement of payment be made upon the mortgage note or bond, yet no part of the debt being actually paid, no part of the mortgage lien is extinguished.[8] A mortgage having been paid by a check and bills of exchange, the latter were dishonored. The title and mortgage deeds were delivered up to the mortgagor, together with a receipt by the mortgagee declaring that the check and bills were received in full of principal and interest due upon the mortgage, and agreeing whenever required to execute a conveyance of the prop-

[1] Goenen *v.* Schroeder, 18 Minn. 66.

[2] Langley *v.* Bartlett, 33 Me. 477.

[3] Robinson *v.* Urquhart, 1 Beas. (N. J.) 515; Enston *v.* Friday, 2 Rich. (S. C.) 427, n.; Smith *v.* Prince, 14 Conn. 472; Boswell *v.* Goodwin, 31 Conn. 74; Markell *v.* Eichelberger, 12 Md. 78; Handy *v.* Commercial Bank of N. O. 19 B. Mon. (Ky.) 98; Choteau *v.* Thompson, 3 Ohio St. 424.

[4] Nightingale *v.* Chafee, 11 R. I. 609; Pond *v.* Clarke, 14 Conn. 334, overruling Peters *v.* Goodrich, 3 Conn. 146.

[5] Boxheimer *v.* Gunn, 24 Mich. 372.

[6] Boxheimer *v.* Gunn, *supra*.

[7] Abbott *v.* Upton, 19 Pick. (Mass.) 434; and see Van Rensselaer *v.* Akin, 22 Wend. (N. Y.) 549; Ayres *v.* Wattson, 57 Pa. St. 360.

[8] Maryland, &c. Co. *v.* Wingert, 8 Gill (Md.), 170; Tucker *v.* Alger, 30 Mich. 67, where a due bill was taken; Burrows *v.* Bangs, 34 Mich. 304.

erty. The mortgagor became bankrupt without having obtained a reconveyance. It was held that the mortgage was not discharged, but that it might still be foreclosed for the balance of the debt remaining unpaid.[1]

936. **The merger of the note in a judgment** does not extinguish the debt, and the mortgage continues a lien till it is satisfied, or the judgment is barred by the statute of limitation.[2]

The rule is the same whether the judgment be for the whole or for a part only of the mortgage debt;[3] and whether the security be in the form of an ordinary mortgage or of a trust deed.[4] Neither does a decree in a foreclosure suit,[5] nor a judgment on *scire facias*,[6] impair the lien of the mortgage; nor the taking of

[1] Teed *v.* Carruthers, 2 Y. & C. Ch. 31. The Vice-Chancellor, in deciding this case, said: "If I were satisfied that the agreement between them was understood and intended by them to be, that the mortgaged estate should be absolutely discharged whether the bills were honored or dishonored, productive or waste paper, however unusual or improvident I might consider such an agreement, I might very possibly have thought it right to give effect to such a contract clearly proved. . . . . I am not, however, satisfied that this, as between themselves, was intended by them; the form of the receipt, and the facts to which I have referred, being, in my judgment, neither conclusive on the point, nor of themselves sufficient to establish so improbable a state of things. I think the case very capable, if necessary, of being viewed in a manner analogous to that in which questions of lien between vendors and purchasers of real estate are considered. Generally, where a vendor receiving bills for the purchase money signs a receipt for the amount as cash, and actually conveys the estate as upon payment, he retains, as between him and the purchaser, a lien on the estate for the money in the event of the bills being dishonored, unless the purchaser can show an agreement to the contrary. Why should a mortgagee reconveying to the mortgagor, on receiving payment in the shape of bills, be in a worse situation than a vendor having or not having a binding contract prior to the conveyance? In the present case a reconveyance has not taken place; but probably if it had (though it is not necessary to decide this point), it would, in my judgment, have made no difference."

[2] Torrey *v.* Cook, 116 Mass. 163; Ely *v.* Ely, 6 Gray (Mass.), 439; Jewett *v.* Hamlin, 68 Me. 172; Priest *v.* Wheelock, 58 Ill. 114; Darst *v.* Bates, 51 Ill. 439; Hewitt *v.* Templeton, 48 Ill. 367; Hamilton *v.* Quimby, 46 Ill. 90; Vansant *v.* Allman, 23 Ill. 30; Wayman *v.* Cochrane, 35 Ill. 152; Markle *v.* Rapp, 2 Blackf. (Ind.) 268; Hensiker *v.* Lamborn, 13 Ind. 468; O'Leary *v.* Snediker, 16 Ind. 404; Jenkinson *v.* Ewing, 17 Ind. 505; Cissna *v.* Haines, 18 Ind. 496; Flanagan *v.* Westcott, 3 Stock. (N. J.) 264; Lewis *v.* Conover, 21 N. J. Eq. 230; Butler *v.* Miller, 1 N. Y. 496; Morrison *v.* Morrison, 38 Iowa, 73; State *v.* Lake, 17 Iowa, 215; Wahl *v.* Phillips, 12 Iowa, 82; Shearer *v.* Mills, 35 Iowa, 499; Hendershott *v.* Ping, 24 Iowa, 134; Jordan *v.* Smith, 30 Iowa, 500; Riley *v.* McCord, 21 Mo. 285; Thornton *v.* Pigg, 24 Mo. 249.

[3] Applegate *v.* Mason, 13 Ind. 75.

[4] Hamilton *v.* Quimby, 46 Ill. 90.

[5] Hendershott *v.* Ping, 24 Iowa, 134; Peck's Appeal, 31 Conn. 215.

[6] Rockwell *v.* Servant, 63 Ill. 424; Helmbold *v.* Man, 4 Whar. (Pa.) 410.

a recognizance for the sum due in place of the mortgage note.[1] The mortgagee may afterwards foreclose the mortgage.[2] The land is liable for the debt till the judgment is paid.

When the judgment is paid by the mortgagor or any one claiming under him, the payment has the effect of a redemption, and gives him the same rights in respect to the property that he would have had upon paying the debt before judgment.[3] And so when the mortgage is satisfied by a sale of the mortgaged land under a decree of foreclosure, neither the mortgage nor the decree is any longer a lien upon it.[4] But if the proceedings in the foreclosure suit be set aside and vacated, the judgment and sale do not cancel the mortgage, but the lien remains and may be enforced by new proceedings.[5]

937. A judgment for a portion of the mortgage debt, as, for instance, for one of several mortgage notes, is no waiver of the lien upon the mortgaged property for the amount reduced to judgment. If an execution be issued upon the judgment, the mortgage lien still continues until the execution is actually satisfied; so that if the creditor is obliged to abandon his levy for any reason, his rights remain the same as if no levy had been made.[6] Neither does the satisfaction of a judgment for a part of the debt affect the mortgage lien for the balance. If one holding a bond and mortgage as collateral security for an amount less than that secured by the mortgage recovers a judgment merely for the amount of the debt due to himself, the satisfaction of it does not extinguish the mortgage lien for the balance.[7]

938. Judgment under trustee process. — A mortgagor may be held to answer to a trustee process brought by a creditor of the mortgagee whenever he would be chargeable if the debt were not secured, and a payment under such process will discharge the mortgage *pro tanto*.[8] The judgment obtained in the trustee process does not, until it is satisfied wholly or in part, affect the mortgage lien.[9] But where the mortgagor being delayed in such process, and arrested for the debt and committed to prison, from

[1] Davis *v.* Maynard, 9 Mass. 242.

[2] Thornton *v.* Pigg, 24 Mo. 249.

[3] Sibley *v.* Rider, 54 Me. 463; Yeomans *v.* Rexford, 35 Pa. St. 273.

[4] People *v.* Beebe, 1 Barb. (N. Y.) 379.

[5] Stackpole *v.* Robbins, 47 Barb. (N. Y.) 212; 48 N. Y. 665.

[6] Applegate *v.* Mason, 13 Ind. 75.

[7] Brumagim *v.* Chew, 19 N. J. Eq. 130.

[8] Eaton *v.* Whiting, 3 Pick. (Mass.) 484. Otherwise if the debt be not liable to the process and the trustee pay the judgment in his own wrong.

[9] Watkins *v.* Cason, 46 Ga. 444.

which he was discharged on taking the poor debtor's oath, and the judgment was thereupon released to him by the creditor, this constituted no defence to an action on the mortgage.[1]

939. Proceedings against the mortgagor personally by a suit upon the mortgage debt, and his commitment to prison upon execution, do not discharge the mortgage.[2]

940. Release of judgment. — But it is generally held that the release of a judgment recovered upon the mortgage debt discharges the mortgage.[3] The mortgagee's acknowledgment of satisfaction of judgment is not, however, conclusive.[4]

Whether a foreclosure commenced by entry under process of law is waived by a subsequent release of the judgment is a question of fact for the jury, when the evidence as to the object of the continued possession is conflicting.[5]

941. The failure to charge an indorser who has made a mortgage to secure the notes indorsed by him does not discharge the lien of the mortgage.[6]

942. The extension of the time of payment of a mortgage in no way impairs the security as against subsequent incumbrancers, even if this be effected by a renewal of the mortgage note.[7] It of course does not impair the security as against the mortgagor when the debt extended is his own, and he remains primarily liable for it. But the rule is different when he has mortgaged his property to secure the debt of another.[8] In such case the mortgagor occupies the position of a surety of the debt, and an extension of the time of payment of that debt without the surety's concurrence discharges the mortgage; as, for instance, where a wife mortgages her land to secure notes indorsed by her husband or any renewals of them, an extension of the time of payment without a renewal was held to discharge her liability;[9] and in an ordinary mortgage not providing for any renewal or continuance

[1] Cary *v.* Prentiss, 7 Mass. 63.
[2] Davis *v.* Battine, 2 R. & My. 76.
[3] Porter *v.* Perkins, 5 Mass. 236.
[4] Perkins *v.* Pitts, 11 Mass. 125.
[5] Couch *v.* Stevens, 37 N. H. 169.
[6] Mitchell *v.* Clark, 35 Vt. 104; Hilton *v.* Catherwood, 10 Ohio St. 109.
[7] Bank of Utica *v.* Finch, 3 Barb. (N. Y.) Ch. 293; Whittacre *v.* Fuller, 5 Minn. 508; Cleveland *v.* Martin, 2 Head (Tenn.), 128; Naltner *v.* Tappey, 55 Ind. 107.
[8] Gahn *v.* Niemcewicz, 11 Wend. (N. Y.) 312; S. C. 3 Paige, 614; Christner *v.* Brown, 16 Iowa, 130; Metz *v.* Todd, 36 Mich. 473.
[9] See § 742; Smith *v.* Townsend, 25 N. Y. 479

of it, any extension by renewal or otherwise without her consent would release her property.[1]

6. *Revivor of Mortgage.*

943. A mortgage after payment becomes functus officio, and neither the mortgagee nor any one else has as a general rule any power to transfer it as a subsisting security, or to revive it to secure the same or any other liability.[2] A mortgage given to secure the repayment of a legacy in case such payment should prove to be invalid is *functus officio* upon a final decision being made sustaining the payment, and cannot be enforced by an assignee.[3]

Such was also the decision where a mortgagor paid and took up the mortgage note and the next day redelivered it to the mortgagee, took back part of the money paid on the note, had the balance indorsed upon it, and agreed with the mortgagee that the mortgage should remain as security for the money repaid to him, and for a collateral liability incurred by the mortgagee for him; a creditor who had attached the land, or levied an execution upon it, or obtained any other incumbrance upon it, is entitled to hold it discharged of the mortgage.[4] It is not in the power of the mortgagee, by reloaning the money paid, to revive the mortgage to the prejudice of a *bonâ fide* incumbrancer whose claim is subsequent to the mortgage but prior to the repayment; and it is immaterial that no receipt of payment has been indorsed upon the mortgage, or upon the bond or note, if the debt has in fact been once paid.[5] But a payment, to have the effect of discharging the debt, must be made to the creditor; and therefore if the principal debtor upon a joint note secured by a mortgage of the property of the other joint maker, pay the amount of the debt to the mortgagor, who obtains an extension of the mortgage, thereupon the latter becomes the principal debtor, and the former principal debtor the surety. The mortgage continues because there has been no payment of the mortgage debt.[6]

[1] Bank of Albion *v.* Burns, 46 N. Y. 170.

[2] McGiven *v.* Wheelock, 7 Barb. (N. Y.) 22; Mead *v.* York, 6 N. Y. 449; Ledyard *v.* Chapin, 6 Ind. 320; Thomas's Appeal, 30 Pa. St. 378; Perkins *v.* Sterne, 23 Tex. 561; Fewell *v.* Kessler, 30 Ind. 195; Pelton *v.* Knapp, 21 Wis. 63.

[3] Rickard *v.* Talbird, Rice (S. C.) Ch. 158

[4] Bowman *v.* Manter, 33 N. H. 530; Warner *v.* Blakeman, 36 Barb. (N. Y.) 501.

[5] Gardner *v.* James, 7 R. I. 396; Large *v.* Vandoren, 14 N. J. Eq. 208; Kellogg *v.* Ames, 41 Barb. (N. Y.) 218; Purser *v.* Anderson, 4 Edw. (N. Y.) Ch. 17.

[6] Fields *v.* Sherrill, 18 Kans. 365.

944. When the mortgage debt is once paid, though the mortgagor takes an assignment of the mortgage to himself, he cannot reissue the mortgage by assigning it to a third person, so as to operate to defeat the claims of prior or intervening creditors;[1] nor can he revive it to the prejudice of others by repaying the money to the mortgagee and agreeing with him that the mortgage shall stand as security.[2] But if the rights of third persons have not intervened, the mortgage might be kept alive in this way; or for a valuable consideration might be continued for another debt. Thus, a mortgage debt being due, the mortgagor delivered a thousand dollars to the mortgagee, which after retaining a few days he returned to the mortgagor at his request, and it was not indorsed upon the mortgage. Although as between the parties there would be no difficulty in continuing the mortgage lien for the whole amount of the mortgage as against other creditors of the mortgagor, the payment is deemed to have been made upon the mortgage debt, and the redelivery of the money does not revive the mortgage lien.[3]

945. If an assignment be made at request of mortgagor to another creditor of his, although the consideration for the assignment moves from the mortgagor and not from the assignee, the transaction does not amount to a payment of the mortgage, but the assignee may enforce it.[4] In such case, especially if the arrangement for the subsequent transfer of the mortgage be made at the time it was originally given, the mortgage will be kept alive and the benefit of it secured to the subsequent assignee to the exclusion of the mortgagor's creditors.[5]

And so if a mortgagor upon paying the mortgage debt has the mortgage assigned to a third person, and afterwards borrows money of another and has the mortgage transferred to him as security for this loan, the latter assignment gives new life to the mortgage, although it was of no validity in the hands of the former assignee.[6]

[1] Gardner *v.* James, 7 R. I. 396; Carlton *v.* Jackson, 121 Mass. 592; and see Whitney *v.* Franklin, 28 N. J. Eq. 126.

[2] Marvin *v.* Vedder, 5 Cow. (N. Y.) 671; Mead *v.* York, 6 N. Y. 449; Champney *v.* Coope, 32 N. Y. 543, reversing 34 Barb. 539; Bowman *v.* Manter, 33 N. H. 530.

[3] Marvin *v.* Vedder, *supra;* and see Darst *v.* Gale, 83 Ill. 136.

[4] Sheddy *v.* Geran, 113 Mass. 378.

[5] Hubbell *v.* Blakeslee, 71 N. Y. 63.

[6] Bolles *v.* Wade, 4 N. J. Eq. (3 Green) 458; and see Hoy *v.* Bramhall, 19 Ib. 74, 563; Goulding *v.* Bunster, 9 Wis. 513.

946. Redelivery of note. — Where a mortgage note is found among the mortgagor's papers after his death, the presumption, in the absence of all evidence of the time and manner of payment, is that it was paid according to its terms; and the estate of the mortgagee is thereupon terminated without a release. A return of the note by the heirs of the mortgagor to the heirs of the mortgagee would not revive the mortgage, as that was extinguished.[1] By the performance of the condition of a mortgage the condition is saved, and the mortgagor is in of his former estate. The mortgage cannot be continued in force by parol agreement, even if the note be reissued for value.[2]

After a mortgage has been paid and discharged, it would seem that to revive it the same formalities of an instrument under seal are necessary as were requisite to create the mortgage in the first instance. Effect may in some instances be given to an instrument made with the intention of reviving the mortgage by declaring it to be an equitable mortgage. This was done in a case where the owner of the equity of redemption, who had assumed the payment of the mortgage, paid the first of the three mortgage notes to the mortgagee, who wrote upon it a receipt of payment, and surrendered it. The owner of the equity subsequently obtained a loan of money, and by an agreement between him, the mortgagee, and the person making the loan, the receipt of payment was erased, and an indorsement of the note made to the lender, with an agreement made by all the parties, but not under seal, written upon the back of the note, whereby the mortgagee assigned the note and the incident security in the mortgage and extended the time of payment as to the mortgagor, with the understanding that the payment of this note should be postponed to that of the two other notes. Although the agreement could not operate in the way intended, as a revival of the mortgage, effect was given to it as an agreement to charge the lands as an equitable mortgage.[3]

When by any arrangement between the mortgagee and mortgagor the mortgage is continued in force as a security for a new indebtedness, although the mortgage has no binding force as a

[1] Richardson *v.* City of Cambridge, 2 Allen (Mass.), 118.

[2] Holman *v.* Bailey, 3 Met. (Mass.) 55; Merrill *v.* Chase, 3 Allen (Mass.), 339; Furbush *v.* Goodwin, 25 N. H. 425. See, however, Purser *v.* Anderson, 4 Edw. Ch. 17.

[3] Peckham *v.* Haddock, 36 Ill. 38.

mortgage, yet a court of equity will not aid the mortgagor, who has obtained the mortgagee's money upon the strength of such arrangement, in obtaining a release or discharge of the mortgage; nor will it aid one to do this who has taken a conveyance of the land from the mortgagor with a knowledge of the facts.[1]

947. After a mortgage is once paid, whether it can by a mere verbal agreement of parties be transferred to a new debt, which it was not originally given to secure, may be questioned,[2] but the mortgage cannot be retained against the will of the mortgagor as security for another debt.[3] A mortgage upon a homestead once paid cannot be revived by the agreement of the husband alone, either verbal or written, where a statute provides that an alienation of the homestead shall not be valid without the signature of the wife. The wife's assent is necessary.[4]

This rule applies as well to an absolute deed and parol defeasance. Such a mortgage when once paid cannot, without consent of all persons interested in the property, be held for another debt of the grantor, but he can compel a reconveyance.[5]

A mortgage for a definite sum, after the payment of that sum, cannot be held as security for a further indebtedness without an agreement to that effect. "There never was a case," says Lord Eldon,[6] "where a man having taken a mortgage by a legal conveyance was afterwards permitted to hold the estate as further charged, not by a legal contract, but by inference from the possession of the deed." Something more than a subsequent verbal agreement is necessary in order to make the mortgage available for future liabilities.[7]

A purchaser of land subject to a mortgage having paid the mortgage notes, and afterwards obtained a loan upon them by representations leading to the belief that the mortgage was still a subsisting lien, is estopped from showing and insisting upon the fact of the payment of the notes. It would be a fraud on his part thus to contradict a statement to the injury of another who had been influenced to act upon the statement as true.[8]

948. Generally the chief difficulty in reviving or continuing

[1] Joslyn *v.* Wyman, 5 Allen (Mass.), 62.

[2] Joslyn *v.* Wyman, *supra;* Merrill *v.* Chase, 3 Ib. 339.

[3] Beardsley *v.* Tuttle, 11 Wis. 74.

[4] Spencer *v.* Fredendall, 15 Wis. 666.

[5] Spencer *v.* Fredendall, *supra.*

[6] Hooper, *ex parte*, 19 Ves. 477.

[7] Johnson *v.* Anderson, 30 Ark. 745; Whiting *v.* Beebe, 12 Ark. 428; Walker *v.* Snediker, 1 Hoff. (N. Y.) Ch. 145.

[8] International Bank *v.* Bowen, 80 Ill. 541.

in force a mortgage which has been substantially satisfied is on account of the intervening rights of third persons, which would be thereby injuriously affected. The condition of a mortgage having been performed, a subsequent incumbrancer has the right to avail himself of the advantage, and not to be postponed to equities newly created which in fact are subsequent to his own claim.[1] Thus, a mortgage given to idemnify the mortgagee for his liability as an indorser of the mortgagor's note cannot, after the payment of that note, be assigned for the mortgagor's benefit as security for another debt, as against the holder of a second mortgage upon the estate then of record, although as between the mortgagor and the assignee it would be a good security.[2]

The question in these cases is whether the original debt has been satisfied within the terms of the mortgage. It does not matter whether this has been accomplished by payment in money, or by the acceptance of anything else in its place. Other security may be taken in place of the original debt, under agreements or circumstances which make the acceptance of the new security a discharge of the old; and whenever this happens the original mortgage cannot, as against third persons especially, be dealt with as a subsisting security.[3] But where the original mortgage surrendered before maturity remains uncancelled of record, and the mortgage notes are reissued, the indorsers of those notes and the holders of them may, under some circumstances, have priority over a mortgage subsequently executed, the mortgagor and the subsequent mortgagees being equitably estopped to claim that the original mortgage was discharged.[4]

949. A wife who mortgages her separate property to secure her husband's debt is a surety, and as such is entitled to the benefit of all securities which the creditor receives from her husband for the debt; and therefore the proceeds of other security for the debt should be first applied to relieve her estate; and although an application to the payment of a further debt of the husband made with his approval is binding against him, as against

[1] Jones *v.* Brogan, 29 N. J. Eq. 139. So a grantor after payment by a purchaser who had assumed the mortgage. Swope *v.* Leffingwell, 4 Mo. App. 525.

[2] Purser *v.* Anderson, 4 Edw. (N. Y.) Ch. 17.

[3] McGiven *v.* Wheelock, 7 Barb. (N. Y.) 22; Hodgman *v.* Hitchcock, 15 Vt. 374.

[4] Jordan *v.* Forlong, 19 Ohio St. 89.

the wife it is a perversion of the security, and operates to discharge, to the extent of it, the lien upon her land.[1]

A wife having joined in a mortgage to release her right of homestead and right of dower in land mortgaged by her husband, to secure his indebtedness, is entitled to the benefit of payments made upon the mortgage and indorsed upon the note; so that without her consent the mortgagee and her husband cannot, by a subsequent arrangement, apply the payment made upon the mortgage debt to another indebtedness, and agree that the mortgage shall stand security for the original amount of the debt. In a subsequent foreclosure the mortgage can be enforced as against the husband according to the agreement made by him; but as against the wife only for the balance of the mortgage after the payment made upon it.[2]

7. *Foreclosure does not constitute Payment.*

950. A foreclosure, whether strict or otherwise, does not of itself discharge the mortgage debt.[3] The mortgagee may sue for and recover the debt or the balance of it. A foreclosure sale, either by decree of court or under a power, fixes the amount of the deficiency. After a strict foreclosure a suit at law may be maintained for any deficiency which may be proved in the suit. The commencement of the action for the debt does not of itself destroy the effect of a strict foreclosure, but the mortgagor is thereupon entitled to bring his bill for a redemption, and upon a payment of the whole debt to have a reconveyance; but if he does not so elect, and a judgment be recovered against him for the difference only between the estimated value of the estate and the debt, there is no equity in allowing him thereafter to redeem.[4]

Foreclosure when complete is a satisfaction of the debt to the amount of the value of the property, at the time when the mortgagor's right was extinguished, and when the mortgaged premises are of greater value than the debt, of course the debt is fully satisfied.[5] If the property, after the extinction of the equity of

[1] Purvis *v.* Carstaphan, 73 N. C. 575.

[2] Brockschmidt *v.* Hagebusch, 72 Ill. 562.

[3] § 1567; Strong *v.* Strong, 2 Aikens, (Vt.) 373; Smith *v.* Lamb, 1 Vt. 395; Vansant *v.* Allmon, 23 Ill. 30; Brown *v.* Wernwag, 4 Blackf. (Ind.) 1; Nunemacher *v.* Ingle, 20 Ind. 135. But in Massachusetts a judgment for the debt or any part of it opens a foreclosure by entry and possession. § 1274.

[4] Lovell *v.* Leland, 3 Vt. 581.

[5] Lovell *v.* Leland, *supra;* Hatch *v.* White, 2 Gall. C. C. 152; Amory *v.* Fair

redemption, depreciate in value, the loss falls upon the mortgagee and not upon the mortgagor.

In Connecticut the law at one time was that a foreclosure and possession of the mortgaged property extinguished the mortgage debt;[1] but this was long since changed by a statute providing that the property should be held to be taken at its value only, and so much of the debt as remained should stand as before.[2] If the value of the property exceeds the debt, the foreclosure when absolute operates even at law as a payment of the debt.[3] But until the title of the mortgagee has become absolute by the expiration of the time limited for redemption after a decree of foreclosure, the debt is not satisfied even in part.[4] The purchase of the equity of redemption by the mortgagee at a sale by the mortgagor's assignee in insolvency or on execution is not at law a satisfaction of the mortgage debt, and the mortgagee is not estopped from claiming that the property is of less value than the amount of the debt.[5]

951. The union of the titles of the mortgagor and mortgagee in the latter or his assignee is tantamount to a foreclosure, and is payment of the mortgage debt to the extent of the value of the premises.[6] Especially if the mortgagee takes a release of the equity of redemption by a deed reciting a full consideration and containing full covenants, the mortgage debt will be presumed to be discharged, in the absence of very strong proof to the contrary. The fact that no demand for the debt is made for a long time afterwards strengthens the presumption.[7] Not infrequently it is expressly agreed between the parties that the premises shall be taken in satisfaction of the mortgage debt;[8] in which case the deed of release from the mortgagor may well de-

banks, 3 Mass. 562; Dunkley *v.* Van Buren, 3 Johns. Ch. 330; Hurd *v.* Coleman, 42 Me. 182; Green *v.* Cross, 45 N. H. 574.

[1] Derby Bank *v.* Landon, 3 Conn. 62; Coit *v.* Fitch, Kirby (Conn.), 255; M'Ewen *v.* Welles, 1 Root (Conn.), 202.

[2] Post *v.* Tradesmen's Bank, 28 Conn. 420.

[3] Bassett *v.* Mason, 18 Conn. 131.

[4] Peck's Appeal from Probate, 31 Conn. 215.

[5] Post *v.* Tradesmen's Bank, 28 Conn. 420; Findlay *v.* Hosmer, 2 Conn. 350.

[6] § 848; Spencer *v.* Harford, 4 Wend. (N. Y.) 381; Marston *v.* Marston, 45 Me. 412; Puffer *v.* Clark, 7 Allen (Mass.), 80. See Cattel *v.* Warwick, 6 N. J. L. (1 Halst.) 190; Hatz's Appeal, 40 Pa. St. 209; Post *v.* Tradesmen's Bank, 28 Conn. 420.

[7] Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35. See, also, Loomer *v.* Wheelwright, 3 Sandf. (N. Y.) Ch. 135; Brewer *v.* Staples, Ib. 579; Jennings *v.* Wood, 20 Ohio, 261; Corwin *v.* Collett, 16 Ohio St. 289.

[8] Catlin *v.* Washburn, 3 Vt. 42.

clare this fact. Where another mortgage is held as collateral to that which is satisfied by a release of the equity of redemption such collateral mortgage is thereby discharged.[1]

952. When foreclosure is made by entry and possession the mortgage debt is thereby paid in full or in part, according to the value of the land,[2] but the foreclosure must be complete and the title of the mortgagee indefeasible, before any defence of payment can be set up by the mortgagor by reason of the proceedings to foreclose.[3] The value of the property is ascertained by appraisement, when suit is brought for the debt. But if a mortgagee who has never entered under his own mortgage purchases the title of a prior mortgagee who has foreclosed his mortgage, and afterwards brings suit on his own mortgage note, the mortgagor is not allowed to prove, as evidence that such debt is paid, that the mortgaged premises and the rents and profits received by the mortgagees are of greater value than the sums secured by both mortgages, for by the conveyance from the prior mortgagee the second mortgagee obtained an absolute title wholly independent of his own mortgage.[4]

A mortgage and note assigned as collateral security for a debt become a trust in the hands of the assignee for the benefit of all parties interested; and if the assignee forecloses the mortgage by entry and three years' possession, the relation of the parties is not changed, but the property as well after foreclosure as before is held in trust; first to pay the debt for which it is pledged, and then the surplus to the owner: such foreclosure does not operate as payment of the debt; but the property must still be reduced to cash by a fair and proper sale of it. Any rise in value in mean time is the assignor's gain, and any decline in price is his loss. The payment dates only from the actual sale of the property and conversion into money.[5]

953. Generally, upon a foreclosure sale of the property the mortgage debt is extinguished to the amount of the purchase money,[6] whether the sale be under a power, or by a decree of a

[1] Wheelwright *v.* Loomer, 4 Edw. (N. Y.) Ch. 232; McGiven *v.* Wheelock, 7 Barb. (N. Y.) 22.

[2] Newall *v.* Wright, 3 Mass. 150; Amory *v.* Fairbanks, 3 Mass. 562.

[3] West *v.* Chamberlin, 8 Pick. (Mass.) 336.

[4] Hedge *v.* Holmes, 10 Pick. (Mass.) 380.

[5] Brown *v.* Tyler, 8 Gray (Mass.), 135.

[6] Deare *v.* Carr, 3 N. J. Eq. (2 Green) 513; Pierce *v.* Potter, 7 Watts (Pa.), 475; Berger *v.* Hiester, 6 Whart. (Pa.) 210; Mott *v.* Clark, 9 Pa. St. 399; Hartz *v.*

court of equity in a foreclosure suit, or upon a judgment for the debt. If the debt be fully paid by such sale, it seems that the purchaser is not entitled to hold the note or bond for the greater security of his title without the debtor's assent, inasmuch as he is entitled to have this evidence of the debt delivered up to him and cancelled.[1] If upon a foreclosure sale duly made the full amount of the mortgage debt, together with the expenses of the sale, be received, the mortgage debt is paid; and if the mortgagee himself bids the full amount of the debt secured and the expenses of sale, the debt is paid, and he cannot, by refusing to execute the deed, rescind the sale and maintain an action on the note.[2] The mortgagee, on becoming the purchaser, is bound to complete his purchase to the same extent as any other purchaser.[3]

A foreclosure sale properly made, whether under a power or by decree of court, discharges the mortgage lien if the whole estate be sold. Even if only a part of the mortgage debt is due, and a sale of the whole property be made to satisfy the amount then due, the sale of necessity releases the security for the amount not due.[4] Likewise if a decree of sale be obtained upon the last of a series of mortgage notes, without including those which had previously matured, a sale under it wholly releases the lien of the mortgage, and no foreclosure can afterwards be had upon the other notes.[5] For a further reason should a foreclosure for a part of the notes operate as a release of the mortgage lien, when the holder of the remaining note becomes the purchaser of the premises and receives the deed of it, inasmuch as he would be presumed to have bought the land at its value, less the unpaid note.[6]

When a foreclosure sale, either under a bill in equity or under a power conferred in the mortgage, is defective for any reason, so that the purchaser, although he takes a conveyance under the sale, does not acquire an indefeasible title, he nevertheless thereby acquires the mortgage title. The sale, therefore, does not amount to a payment in whole or in part, but only to an assignment.[7] If the mortgagee himself has purchased at such such sale,

Woods, 8 Ib. 471; Wing *v.* Hayford, 124 Mass. 249.

[1] In re Coster, 2 Johns. (N. Y.) Ch. 503.

[2] Hood *v.* Adams, 124 Mass. 481.

[3] Hood *v.* Adams, *supra.*

[4] Smith *v.* Smith, 32 Ill. 198.

[5] Rains *v.* Mann, 68 Ill. 264.

[6] Robins *v.* Swain, 68 Ill. 197.

[7] See § 812; see, however, Goodenow *v.* Ewer, 16 Cal. 461.

and the equity of redemption for any reason is in no part foreclosed, his title remains unaffected by the proceedings.[1]

When a sale under a power has not been conducted in a manner to obtain the real value of the property, or the sale is merely a nominal one, it is a good defence, to an action to recover the balance of the debt, that, if the sale had been made in good faith, the property would have sold for more than enough to pay the debt.[2] The holder of the mortgage, in making sale of the property, is bound to adopt all reasonable modes of proceeding, in order to render the sale as beneficial as possible to the debtor. As a trustee he cannot, unless specially authorized, become the purchaser; and this objection is not obviated by his assigning the mortgage to another who makes the sale and he purchases the property under its value. In a suit for the balance of the debt, such facts may be shown and the actual value of the land must be allowed.

Of course when proceedings for the foreclosure of a mortgage have been set aside on account of irregularities or fraud in such proceedings, the mortgage remains unsatisfied in any part, as much as if no attempt to foreclose had been made, and the mortgagee may again proceed to enforce it.[3]

The statute of limitations may be pleaded in bar of an action to recover the balance due after the value of the land has been applied towards the payment of the mortgage.[4]

954. If the holder of a first mortgage purchase the equity of redemption at a sale upon execution, the sale being made subject to the mortgage, the purchase operates as a payment of the mortgage debt, and he has no further remedy on the debt.[5] In like manner if the holder of one note secured by the mortgage purchase at a sale upon foreclosure for the other notes.[6] The purchaser is presumed, in such case, to have bought the land at its value less the unpaid note. The mortgagee's purchase of prem-

[1] Hollister *v.* Dillon, 4 Ohio St. 197.

[2] Howard *v.* Ames, 3 Met. (Mass.) 308. Chief Justice Shaw, commenting upon the evidence in this case, said: "It shows that it is the plaintiff's own fault that the debt is not fully paid."

[3] Stackpole *v.* Robbins, 47 Barb. (N. Y.) 212.

[4] Cross *v.* Gannett, 39 N. H. 140.

[5] Speer *v.* Whitfield, 10 N. J. Eq. (2 Stock.) 109; Biggins *v.* Brockman, 63 Ill. 316; Murphy *v.* Elliott, 6 Blackf. (Ind.) 482.

[6] Robins *v.* Swain, 69 Ill. 197; and see Weiner *v.* Heintz, 17 Ill. 259.

ises at a foreclosure sale, though for a less sum than was secured by the mortgage, extinguishes the lien of the mortgage.[1]

955. If the mortgaged property be sold for taxes, and the mortgagor buys in the land, or subsequently redeems it from such sale, he does not thereby defeat the mortgage title, but inasmuch as it is his duty to pay the taxes and protect the mortgage title, his purchase must be regarded merely as a payment of the taxes by him.[2] Whether a tax is a lien upon the entire estate, or only upon the equity of redemption of the owner to whom the tax is assessed, depends upon the special statutes of the different states regulating this matter;[3] but even when the lien for taxes is superior to the mortgage lien, it is usual to allow to the mortgagee a certain time for redemption after actual notice to him of the sale.

And, on the other hand, if the mortgagee acquires a tax title to the mortgaged premises, this is regarded as merely in protection of his mortgage title, and not as a bar to the mortgagor's redeeming. Upon redemption, however, the mortgagor must pay the sum advanced for the tax title in addition to the mortgage debt. The same rule applies when the mortgage is by way of an absolute deed with a bond of defeasance.[4]

8. *Who may receive Payment and make Discharge.*

956. Payment should be made to the person to whom the mortgage debt is due. Even if the mortgage itself has not been assigned, if the debtor has knowledge that the debt has been assigned, and is held by a person other than the mortgagee, who appears by record to be the holder of the mortgage, he must pay to the assignee of the debt without regard to the ownership of the mortgage, as it appears by the records. Generally a discharge of the mortgage would be tendered with a demand for the payment of it; but even if this be not done, the debtor, when satisfied of the right of the holder of the debt, may pay to him, and rely upon the statutory provisions for enforcing a discharge of record. As already observed, payment alone, even at common law, when made in accordance with the condition of the mortgage,

[1] Seligman *v.* Laubheimer, 58 Ill. 124.

[2] See § 680; Frye *v.* Bank of Illinois, 11 Ill. 367; Hawkins *v.* McVae, 14 La. Ann. 339.

[3] See Parker *v.* Baxter, 2 Gray (Mass.), 185; Perry *v.* Brinton, 13 Pa. St. 202.

[4] Clark *v.* Laughlin, 62 Ill. 278. See § 714.

discharges the mortgage lien; and in many of the states payment at any time has the same effect. If the debtor be in doubt to whom to make payment, or as to obtaining a sufficient discharge of the lien, he may resort to a bill to redeem.

In making a payment upon a mortgage the debtor should always require the production of the note or bond secured by it, otherwise it may turn out that this evidence of the debt has been assigned, or perhaps that a formal assignment of the mortgage has been made and recorded; and although the mortgagor is protected in making payment to the mortgagee until he has received notice of the assignment of the mortgage,[1] yet this notice may be constructive as well as actual, and the debtor always incurs much risk in making payments without having actual knowledge that the person to whom he makes payment actually holds the mortgage at the time.[2]

A married woman holding a mortgage as her separate estate can of course receive payment; but as a general rule a discharge of the mortgage should be executed by her in the manner prescribed by statute for a conveyance of her separate estate. Her separate discharge, like her separate receipt of the debt, might be equitably sufficient, even under laws which make her separate conveyance ineffectual. But where it is necessary to a valid conveyance of her separate property that her husband should join in the deed, it is proper, and generally necessary, that he should join in her discharge of a mortgage. The necessity for this may be done away with by special statute, as is the case in Pennsylvania.[3] Of course in states where a married woman can convey her separate estate as if she were sole, she can alone make a valid discharge.

957. When a recorded mortgage is discharged by a person other than the mortgagee, the person paying the money, and all subsequent purchasers as well, are bound to inquire what authority he had to discharge it, and are chargeable with notice of such facts as by proper inquiry might have been ascertained.[4] If the discharge is made by one professing to act in a representative capacity, as, for instance, as administrator or guardian, and he has

[1] Hodgdon *v.* Naglee, 5 W. & S. (Pa.) 217.

[2] Clark *v.* Igelstrom, 51 How. (N. Y.) Pr. 407. See § 814.

[3] Any married woman, owning any mortgage, may assign or satisfy the same of record, with like effect as if she were unmarried. Purdon's Ann. Dig. p. 2136, § 1.

[4] Swarthout *v.* Curtis, 5 N. Y. 301.

not been empowered to act, or has been empowered to act only after giving a bond, and has failed to comply with this requirement, the discharge will not bind those whom he represents, and will not protect one who afterwards purchases in good faith.[1] In like manner when moneys have been invested by a clerk or other officer of court, under its direction, in his own name, an order of court would generally be necessary to empower him to discharge it, and his discharge without such order would be void, even against subsequent purchasers in good faith.[2]

A mortgagee, with notice that a prior mortgage has been improperly discharged without being satisfied, still holds subject to that mortgage as much as if no discharge had been made ;[3] if, for instance, he has notice that the prior mortgage has been assigned as collateral security, and the assignment not being recorded, the assignor enters satisfaction of it on record, this does not deprive the assignee of his priority of claim. The discharge, however, would bar all equitable rights of the assignor, and the assignee could recover only to the extent of his actual interest in the mortgage.[4]

And yet the cases go further than this, and hold that an entry of satisfaction by a mortgagee, after he has parted with his interest in the security, will not discharge the mortgage in favor of one who had acquired an interest in the land before the discharge was made. He is no worse off than he supposed himself to be when he acquired his interest; and there is no reason in equity why the person really entitled to the mortgage should not have the benefit of it so far as he is concerned. But the case is quite otherwise when one has purchased the land in good faith after such entry of satisfaction and relying upon it, having no notice of the assignment, or of any want of authority in the making of such entry. The effect of the discharge cannot be avoided as against him.[5]

A mortgage given by a trustee to his *cestui que trust*, conditioned for the faithful execution of the trust, cannot be discharged by his paying the money to himself, nor by his receiving the money from a purchaser of the property.[6]

[1] Swarthout *v.* Curtis, 5 N. Y. 301.

[2] Farmers' Loan & Trust Co. *v.* Walworth, 1 N. Y. 433.

[3] Morgan *v.* Chamberlain, 26 Barb. (N. Y.) 163 ; Ely *v.* Scofield, 35 Ib. 330.

[4] Gibson *v.* Miln, 1 Nev. 526.

[5] Roberts *v.* Halstead, 9 Pa. St. 32.

[6] Hawkins *v.* Taylor (Ga. 1878), 7 Reporter, 105.

958. A mortgage held by two or more persons jointly to secure a joint debt may be paid to any one of them, and he can effectually discharge it, either by an entry upon the record or by a deed of release.[1] As between the mortgagees, he who receives payment is a trustee for the benefit of all who have an interest in the fund; but this does not concern the mortgagor, who may deal with one as representing all. Upon the death of one of two joint holders of the mortgage, the survivor has the exclusive right to receive payment and discharge the mortgage.[2] When, however, the mortgage secures notes or other obligations which are held by the mortgagees separately, it is necessary that all of them should join in receiving payment and in making discharge of the mortgage;[3] and of course, upon the death of the holder of a separate obligation, his representatives must join in a discharge.

When one mortgagee assents to a release made by a joint mortgagee, and receives a part of the money paid to obtain it, having knowledge of the facts, he is bound by the release, even in case the release alone would not bind him.[4]

Where there are two or more joint mortgagees, who are each owners in severalty of a part of the mortgage debt, one of them may so act as to merge his own mortgage interest without affecting that of another.[5]

959. One of two executors may receive payment of a mortgage belonging to the estate under their charge, and give a valid release, whether the mortgage was made to the testator or to the executors as such; and an administrator has the same power.[6] This is so even where the will makes the executors trustees, and directs them to retain the mortgage, with other securities, for the purposes of the trust, unless it appears that the estate has been set-

[1] Goodwin *v.* Richardson, 11 Mass. 469; Bruce *v.* Bonney, 12 Gray (Mass.), 107. In **Massachusetts** this authority is given by statute 1870, c. 171, though it existed before. Carman *v.* Pultz, 21 N. Y. 550; People *v.* Keyser 28 N. Y. 235; Pierson *v.* Hooker, 3 Johns. (N. Y.) 68; Bulkley *v.* Dayton, 14 Ib. 387; Stuyvesant *v.* Hall, 2 Barb. (N. Y.) Ch. 151; Bowes *v.* Seeger, 8 W. & S. (Pa.) 222; Penn *v.* Butler, 4 Dall. (Pa.) 354.

[2] Gilson *v.* Gilson, 2 Allen (Mass.), 115; Savary *v.* Clements, 8 Gray (Mass.), 155; People *v.* Keyser, 28 N. Y. 235.

[3] Burnett *v.* Pratt, 22 Pick. (Mass.) 556. See § **794**.

[4] Hubbard *v.* Jasinski, 46 Ill. 160.

[5] Loomer *v.* Wheelwright, 3 Sandf. (N Y.) Ch. 135.

[6] People *v.* Miner, 37 Barb. (N. Y.) 466; 23 How. Pr. 223; Bogert *v.* Hertell, 4 Hill (N. Y.), 492; Douglass *v.* Satterlee, 11 Johns. (N. Y.) 16; Murray *v.* Blatchford, 1 Wend. (N. Y.) 583; Wheeler *v.* Wheeler, 9 Cow. (N. Y.) 34; People *v.* Keyser, 28 N. Y. 228. In this latter case the previous decisions are noticed at length. See § **796**.

tled, and that the securities are held by them as trustees, or that not enough securities remain in their hands to fulfil the trust. *Primâ facie* the discharge is valid.[1] Trustees must generally, in all matters which involve judgment and discretion, act jointly; but under some circumstances one trustee may receive payment of a mortgage and enter satisfaction, as, for instance, when he is an acting trustee, and his co-trustee is absent from the country for a long period.

It seems that an executor or administrator may make a valid discharge of a mortgage which a mortgagee held as "trustee," when there is nothing to show the nature of the trust, and no new trustee has been appointed to execute the trust.[2]

960. Whether a foreign executor or administrator can make a valid discharge of a mortgage has been a matter of doubt. Undoubtedly his receipt for the money discharges the debt; but under the present system of recorded titles it is a matter of importance that the authority of the executor or administrator should be a matter of record in the state where the land is situated, and the discharge is to be recorded; and for this reason it is necessary to require an administration to be taken upon the estate of the mortgagee or other holder of a mortgage in the state where the mortgaged premises are situate, before making payment of the incumbrance.[3]

While, therefore, an executor or administrator appointed in one state may receive payment of a mortgage upon land in another, if it be voluntarily made, yet the courts of the state in which the land is situate will not aid him in enforcing payment, until he is authorized to act under the appointment of the proper tribunal of such state.[4]

Doubtless the foreign executor or administrator might exercise a power of sale; but a practical difficulty about his doing so would be that no judicious person would take the title which he could give. He might also assign the mortgage to a resident of the state in which the land is situated, if any one could be found to

[1] Weir *v.* Mosher, 19 Wis. 311.

[2] Sturtevant *v.* Jaques, 14 Allen (Mass.), 523, 527.

[3] See § 797; Hutchins *v.* State Bank, 12 Met. (Mass.) 421, 425. See Stone *v.* Scripture, 4 Lans. (N. Y.) 186.

[4] Vroom *v.* Van Horne, 10 Paige (N. Y.), 549; Doolittle *v.* Lewis, 7 Johns. (N. Y.) Ch. 45; Morrell *v.* Dickey, 1 Ib. 153; Parsons *v.* Lyman, 20 N. Y. 112; Petersen *v.* Chemical Bank, 32 N. Y. 22; 29 How. Pr. 240; Vermilyea *v.* Beatty, 6 Barb. (N. Y.) 429.

take such an assignment. But he would not be allowed to prosecute a suit in his representative capacity for foreclosure in a state where he had not received appointment.[1]

961. An assignee of a mortgage by a formal assignment has, of course, the right to receive payment and power to make due acquittance of it. But, as already noticed,[2] although his assignment has been duly recorded, he makes himself liable to loss if he fail to give notice to the debtor of his ownership of the security; for until he do this the debtor is justified in paying to the mortgagee, only that in making payment of the whole amount of the debt his neglect to require the surrender of the note or bond would invalidate the payment. Not only should the debtor require the production of the evidence of the debt, as proof of authority to receive payment of it, but for the further reason that, upon discharging the debt, he is entitled to have the evidence of it delivered up to be cancelled.[3]

After an assignment of a mortgage no transaction between the mortgagor and the mortgagee can defeat the assignee's right to enforce the note and mortgage. If the mortgage be transferred at the request of the mortgagor as security for another debt of his, and the mortgagee is secured in some other way, or is paid, the mortgage remains a valid security in the hands of the assignee.[4]

962. After an equitable assignment of the mortgage by an indorsement of the mortgage note, or by a delivery of it merely with a power of attorney to collect it in the name of the assignor, a payment to the assignor and a discharge by him will not discharge the mortgage.[5] The fact that the mortgagor, on making payment to an equitable assignee who has possession of the securities, demands and receives indemnity against loss, knowing that another person makes claim to the mortgage by a formal assignment, is not a suspicious circumstance affecting the validity of the equitable assignment.[6]

963. One who holds a mortgage by assignment as collateral security for a sum smaller than the mortgage debt may receive payment, or may compel payment by foreclosure; and holding the mortgage title of record he may give a valid dis-

[1] Trecothick *v.* Austin, 4 Mason, 16, 33.
[2] See § 791.
[3] *In re* Coster, 2 Johns. (N. Y.) Ch. 503.
[4] Sheddy *v.* Geran, 113 Mass. 373.
[5] Cutler *v.* Haven, 8 Pick. (Mass.) 490; Gordon *v.* Mulhare, 13 Wis. 22. See § 817.
[6] Haescig *v.* Brown, 34 Mich. 503.

charge. If he collects a sum more than sufficient to pay the debt due him, he will hold the surplus in trust for his assignor.[1]

964. Payment may be made to a duly authorized agent, and his agency may be inferred from possession of the securities. As a general rule, a mortgage debtor is authorized to infer that an attorney or agent who has been employed to make a loan and retains possession of the bond and mortgage is empowered to receive payment of both the interest and of principal.[2] But this inference is founded on his custody of the securities, and it ceases when these are withdrawn by the creditor ;[3] and it is incumbent on the debtor who relies upon a payment so made to an attorney or agent to show that the securities were in his possession when he made the payment, unless the action of the creditor be such as to estop him from denying the agency.[4] The son of a mortgagee in possession of the papers is presumed to have authority to receive payments, but this presumption of course ceases upon his father's death.[5] A legatee who is entitled to the interest of a mortgage for life, having possession of the bond or note, may be presumed to be authorized to receive the interest; but this presumption would not extend a collection of the principal.[6]

In making payments to an agent the mortgage debtor should be assured of his continued authority to act for the owner of the mortgage; and such assurance of this as may be derived from his possession of the mortgage note or bond, and indorsement thereon of the payment, would be omitted only through great negligence.[7] Authority of an agent to receive interest or principal on a mortgage cannot be inferred from the fact that the agent had collected and paid over to the mortgagee interest on other mortgages.[8] Even authority to collect the interest upon a mortgage does not afford ground for inferring authority to collect the principal, where the agent is not intrusted with the possession of the

[1] Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48; Norton *v.* Warner, 3 Edw. (N. Y.) 106.

[2] Williams *v.* Walker, 2 Sandf. (N. Y.) Ch. 325; Hatfield *v.* Reynolds, 34 Barb. (N. Y.) 612; Van Keuren *v.* Corkins, 4 Hun (N. Y.), 129; 66 N. Y. 77.

[3] Megary *v.* Funtis, 5 Sandf. (N. Y.) Sup. Ct. 376; Brown *v.* Blydenburgh, 7 N. Y. 141; Cox *v.* Cutter, 28 N. J. Eq. 13.

[4] Haines *v.* Pohlmann, 25 N. J. Eq. 179; Smith *v.* Kidd, 68 N. Y. 130.

[5] Megary *v.* Funtis, *supra.*

[6] Giddings *v.* Seward, 16 N. Y. 365.

[7] See Kimball *v.* Goodburn, 32 Mich. 10, as to discharge of a mortgage already paid, executed by the last secretary of the company.

[8] Cox *v.* Cutter, *supra;* Smith *v.* Kidd, *supra.*

securities.[1] The rule has been strictly adhered to in all the adjudged cases that the possession of the securities by the agent is the indispensable evidence of his authority to collect the principal.[2] After an agent has without authority collected the principal of a mortgage, and the mortgagee, after learning the fact, but without full knowledge of all the material facts of the agent's wrongful acts, accepts from him security for the amounts he had collected, such acceptance is not a ratification of the payment to the agent, and does not estop the mortgagee from repudiating it; nor does it furnish evidence of the agent's original authority to receive payment.[3]

If payment be made to an attorney, by giving other securities which he was once authorized to receive in settlement, the mortgage is satisfied, where the circumstances are such that the mortgagor was justified in supposing that the attorney still had authority to settle in that manner.[4] In like manner, where an attorney, foreclosing his client's mortgage, discontinued the suit and declared the mortgage paid, upon receiving part of the amount due in cash and the balance in the debtor's note to himself personally, by way of a loan to the debtor, the mortgage was held to be extinguished.[5]

An attorney employed to foreclose a mortgage cannot without special authority receive notes for the amount, or extend the payment of the debt.[6] He can only receive money in payment. After receiving a part of the debt he cannot make a valid extension of the time of payment of the residue; but the holder of the mortgage may proceed to foreclose immediately. The mortgagor is in law affected with notice that the attorney has no power to receive notes in payment or to extend the time of pay-

[1] Williams *v.* Walker, 2 Sandf. Ch. (N. Y.) 325; Smith *v.* Kidd, 68 N. Y. 130.

[2] Curtis *v.* Drought, 1 Molloy, 487; Henn *v.* Conisby, 1 Ch. Cas. 93 n.; Gerard *v.* Baker, Ib. 94; Wostenholme *v.* Davies, 2 Freem. Ch. 289; Smith *v.* Kidd, *supra*. "Any other principle would be dangerous in the extreme. If the fact, that a capitalist makes investments on bond and mortgage through an attorney, and employs him to collect the interest, and in special cases authorizes him to collect the principal of particular mortgages, is sufficient to warrant a finding of a general authority to collect the principal of all the mortgages of the client, notwithstanding that the client takes the precaution to retain his securities in his own possession, no investor would be safe." Per Rapallo, J., in Smith *v.* Kidd, *supra*.

[3] Smith *v.* Kidd, *supra*.

[4] Mallory *v.* Mariner, 15 Wis. 172.

[5] Hawkes *v.* Dodge County, &c. Ins. Co. 11 Wis. 188.

[6] Heyman *v.* Beringer, 1 Abb. (N. Y.) N. C. 315.

ment. A payment to the attorney of notes so taken by him is not a payment on the mortgage, unless the holder of it receives the proceeds.[1]

965. A receiver authorized by order of court, upon receiving payment of a mortgage debt, to execute formal satisfaction and discharge of the mortgage, has authority to receive payment and to satisfy the mortgage although it be not due at the time.[2]

9. *Discharge by Mistake or Fraud.*

966. A discharge obtained by fraud or made through mistake may be cancelled if other parties, having no notice of the fraud, have not in the mean time acquired an interest in the property.[3] The cancellation is of course presumptive evidence that the mortgage has been actually satisfied; but it is not conclusive of this. The burden is upon the person who would impeach the cancellation to show that the mortgage was not actually paid, and that the discharge was obtained either by fraud practised upon the holder of the mortgage, or was made by him through some mistake of fact.[4]

Of course an unauthorized cancellation of a mortgage by the recorder does not in any way impair the rights of the owner of the mortgage,[5] even against one who has purchased the mortgaged premises in good faith, relying upon the cancellation appearing of record.[6]

If one be induced by the fraudulent representations of the mortgagor to deliver up the mortgage together with the mortgage note, and to take instead worthless security, the mortgage, not being discharged of record or released by deed, may be foreclosed as a subsisting lien.[7] And if a discharge of record has been made by the mortgagee upon receiving a worthless check or worthless security, the mortgage may still be foreclosed, if no one has afterwards acquired an interest in the property, relying upon the

[1] Heyman *v.* Beringer, 1 Abb. (N. Y.) N. C. 315.

[2] Heermans *v.* Clarkson, 64 N. Y. 171.

[3] Stover *v.* Wood, 26 N. J. Eq. 417; McLean *v.* Lafayette Bank, 3 McLean, 587; Fassett *v.* Smith, 23 N. Y. 252; Barnes *v.* Camack, 1 Barb. (N. Y.) 392; Weir *v.* Mosher, 19 Wis. 311; Hollenbeck *v.* Shoyer, 16 Wis. 499; Vannice *v.* Bergen, 16 Iowa, 555.

[4] Lilly *v.* Quick, 1 Green (N. J.) Ch. 97; Trenton Banking Co. *v.* Woodruff, Ib. 117; Miller *v.* Wack, Saxt. (N. J.) 204; Middlesex *v.* Thomas, 20 N. J. Eq. 39.

[5] Mechanics' Building Ass. *v.* Ferguson, 29 La Ann. 548.

[6] Harris *v.* Cook, 28 N. J. Eq. 345.

[7] Grimes *v.* Kimball, 3 Allen (Mass.), 518.

discharge, though a cancellation of the discharge might first be obtained in equity.[1]

A release executed by the mortgagee and placed in the hands of a third person, to be delivered upon certain conditions to the mortgagor, is not operative if delivered before the performance of the conditions; and if by accident, mistake, or fraud, it is placed on record before such performance, as against the mortgagee the court will order the discharge to be cancelled. A judgment creditor of the mortgagor acquires no rights or advantage by the recording of the release, and may be restrained from selling anything more than the equity of redemption.[2] And it would seem that an innocent purchaser would not be protected by such record of the release before delivery.[3] It is likened to a deed which the grantee had stolen, where no title is thereby acquired, and it is distinguished from one obtained by fraud from the grantor when the title passes by the actual delivery of the grantor himself.[4]

A father having made a mortgage to his daughter, who was a minor, for the consideration, as expressed, of natural love and affection, afterwards being dissatisfied with her marriage, without authority from her, entered satisfaction of it on record. The daughter was still a minor, and the mortgage note had never been delivered to her, although the mortgage itself had been delivered and recorded. Upon suit by her the entry of satisfaction was set aside as fraudulent, and judgment was entered for the amount of the note and interest, and enforced against the property.[5]

967. If the giving up of the mortgage notes, or a formal discharge of the mortgage, has been obtained by fraudulent means, this is no payment and discharge of the mortgage.[6] In such case a subsequent mortgagee, whose rights existed at the time of such discharge, cannot object to the prior mortgagee being restored to his rights.[7] And so also the mortgage will be rein-

[1] Middlesex *v.* Thomas, 20 N. J. Eq. 39; De Yampert *v.* Brown, 28 Ark. 166.

[2] Stanley *v.* Valentine, 79 Ill. 544.

[3] Stanley *v.* Valentine, *supra*, and cases cited. See §§ 540, 541.

[4] Per Mr. Justice Walker, in Stanley *v.* Valentine, *supra*.

[5] Mallett *v.* Page, 8 Ind. 364.

[6] Grimes *v.* Kimball, 3 Allen (Mass.), 518; Weir *v.* Mosher, 19 Wis. 311; and see Eyre *v.* Burneester, 10 H. L. 90; 8 Jur. N. S. 1019; Reagan *v.* Hadley, 57 Ind. 509.

[7] Downer *v.* Miller, 15 Wis. 612; Robinson *v.* Sampson, 23 Me. 388; Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq.

stated, not only as against the mortgagor, but against one who has purchased from him with notice of the mortgage, or without giving any new consideration, and in whose favor no new rights have intervened since the release.[1] Of course the mortgage cannot be restored as against one who has in good faith purchased the property after the cancellation, or has advanced money upon it upon the faith of a clear record title. The mortgage cannot be restored when the rights of innocent third persons will be affected.[2] The holder of the mortgage wrongfully discharged should therefore lose no time in taking steps to have his mortgage restored.[3]

A judgment creditor of the mortgagor would not by virtue of his lien stand in the condition of a purchaser in this respect, because he does not part with any value or become worse off by reason of the discharge of the mortgage. But a purchaser under execution sale would have the right to stand upon the record title if he had no notice of the equities of the holder of the notes, and it would seem that the judgment plaintiff himself, purchasing at the judicial sale, would have this right.[4]

968. When a mortgage has been obtained by fraud from the mortgagor, and the mortgagee has assigned it as collateral security to one who is not shown to have participated in the fraud, or to have known of it, although the court cannot cause the mortgage to be discharged as against such holder, it may order the mortgagee who fraudulently obtained it to pay the sum secured to the holder of the assignment of it, and to cause the mortgage to be discharged within a given time.[5]

When the lien cannot be restored, either wholly or in part, the mortgagor is entitled to recover of the person who induced the making of the release the amount of the security released, and not merely such deficiency as may result on the mortgage. Even when a part of the mortgaged premises are released, and the part remaining is worth more than the mortgage debt, yet so far as the

(1 Green) 117; Eggeman *v.* Harrow, 37 Mich. 436.

[1] Ellis *v.* Lindley, 37 Iowa, 334; Reed *v.* King, 23 Iowa, 500; Reagan *v.* Hadley, 57 Ind. 509.

[2] Scholefield *v.* Templer, 4 De G. & J. 429; Fassett *v.* Smith, 23 N. Y. 252; Viele *v.* Judson, 15 Hun (N. Y.), 328; Etzler *v.* Evans, 61 Ind. 56.

[3] Viele *v.* Judson, *supra.*

[4] Vannice *v.* Bergen, 16 Iowa, 555. See § 460.

[5] Mason *v.* Daly, 117 Mass. 403.

value of the security is lessened by the defendant's fraud or bad faith, the mortgagee is entitled to recover.[1]

969. To entitle one to relief on the ground of mistake, it must be a mistake of fact and not a mistake of law: thus where a husband, under the erroneous supposition that as executor of his deceased wife he was liable, paid a mortgage upon her estate, no relief could be afforded him in equity.[2] For mistakes of law, neither courts of law nor of equity give relief. When there is no mistake nor misrepresentation as to the facts, and no fraud, there is no redress.[3] Upon this ground relief was refused to one who purchased land subject to a mortgage, and supposing that he had a good title upon paying off the mortgage had it cancelled on the record. Afterwards discovering that his title was not good, he sought to have this cancellation set aside and the mortgage declared in force, on the ground that had he then known of the defect in his title he would have taken an assignment of the mortgage to protect his title; but this was not regarded as a mistake as to a matter of fact.[4] The mistake of fact, moreover, must be of such a nature that it could not by reasonable diligence have been avoided at the time; and on this ground the court refused to set aside a discharge, voluntarily made by the holder of a mortgage under an apprehension that the debt had been satisfied, when, as he alleged, it had not been satisfied.[5]

Relief may be had where the mortgagee supposing erroneously that the mortgage had been foreclosed, and that the mortgagor was entitled to the notes, has delivered them up without payment.[6] In like manner where a mortgagee, upon the mortgage becoming due, by agreement with the mortgagor took the mortgaged property in satisfaction of it, and thereupon executed a release, which was recorded, the release was ordered to be cancelled, so as to restore the mortgage to its priority over other incumbrances intervening between the giving of this mortgage and the satisfaction of it.[7] The ground of the application was the fraudulent concealment of the existence of the subsequent incumbrances; but mistake would also be a sufficient ground for

[1] Stebbins *v.* Howell, 4 Abb. (N. Y.) App. Dec. 297.

[2] Peters *v.* Florence, 38 Pa. St. 194.

[3] Hampton *v.* Nicholson, 23 N. J. Eq. 423; Railroad Co. *v.* Soutter, 13 Wall. 517.

[4] Bentley *v.* Whittemore, 18 N. J. Eq. 366.

[5] Banta *v.* Vreeland, 15 N. J. Eq. 103.

[6] Smith *v.* Smith, 15 N. H. 55.

[7] Lambert *v.* Leland, 2 Sweeny (N. Y.), 218.

it. Relief may also be given when a mortgagee has cancelled the mortgage and given up the note or bond, on receiving a check or draft or other security for the amount of the debt, which turns out to be uncollectible; and this would be given whether the check was given with a fraudulent intent, or whether it was taken under a mistake of fact on both sides that the draft was good, when it proved not to be good by reason of the failure of the bank.[1]

One who paid off a mortgage on land which he supposed belonged to his wife, who was a widow at the time of his marriage with her, when in fact it belonged to her daughter, was allowed the amount paid with interest as an equitable lien upon the land.[2]

If a mortgagor pays a note through mistake, supposing the signature to be genuine, when it was in fact forged and the genuine note had been transferred to another, he may recover the money paid in an action for money had and received.[3]

970. Relief may be had in equity against a discharge of a mortgage made by mistake or through ignorance, when an assignment was intended.[4] But in the absence of any such ground for relief a mere stranger who voluntarily pays off a mortgage and allows the mortgage to be cancelled, relying upon the validity of his own title to the property, cannot afterwards come into equity for relief and ask to be substituted in the place of the mortgagee.[5]

The allegation of mistake is supported by proof that, although the mortgagee intentionally discharged the mortgage, the person who was to pay the money only intended to purchase the mortgage at the request of the mortgagor, and accordingly, on the note and mortgage being brought to him, declined to take them, but took an assignment instead. Under the prayer for general relief the mortgage was established, and the mortgagor restrained from setting up the discharge.[6]

971. When a new mortgage is substituted in ignorance of

[1] Grimes *v.* Kimball, 3 Allen (Mass.), 518; Middlesex *v.* Thomas, 20 N. J. Eq. 39, and see Hunt *v.* Fox, 5 B. Mon. (Ky.) 327; Hollenbeck *v.* Shoyer, 16 Wis. 499.

[2] Haggerty *v.* McCanna, 25 N. J. Eq. 48.

[3] Welch *v.* Goodwin, 123 Mass. 71.

[4] Russell *v.* Mixer, 42 Cal. 475; Dudley *v.* Bergen, 23 N. J. Eq. 397, and cases cited; Dubois *v.* Schaffer, Ib. 401; Hampton *v.* Nicholson, Ib. 423; Skillman *v.* Teeple, Saxt. (N J.) Eq. 232; Champlin *v.* Laytin, 18 Wend. (N. Y.) 407.

[5] Guy *v.* Du Uprey, 16 Cal. 195.

[6] Bruce *v.* Bonney, 12 Gray (Mass.), 107.

an intervening lien, the mortgage released through mistake may be restored in equity and given its original priority as a lien. This was done in a case where the holder of a first mortgage, in ignorance of the existence of a subsequent one on the premises, released his mortgage and took a new one. There was no evidence of mistake except such as might be inferred from the mortgagee's ignorance of the existence of the intermediate mortgage, and there was no evidence that he would not have made this arrangement had he known this fact; but it was considered that although the court was not at liberty to infer facts not proved, yet that it was at liberty to draw all the inferences which logically and naturally follow from the facts proved; that it is not an act of reasonable prudence and caution such as men commonly use in the conduct of business affairs for one having a first mortgage upon property, without consideration or other apparent motive to release it, and take a new mortgage subject to a prior lien of a considerable amount; and therefore it may be inferred that the mortgagee would not have made the release had he known of the intervening mortgage.[1]

Where a new mortgage is taken to secure the payment of the same debt, and the fact is so stated in the mortgage, the old mort-

[1] Bruse *v.* Nelson, 35 Iowa, 157.

In this case the original mortgage secured the payment of three notes of $919.50 each. Shortly afterwards the mortgagee wishing to transfer two of the notes to a creditor of his, it was arranged between the parties that a new mortgage should be made running directly to this creditor, and that he should loan to the mortgagor a small additional sum to make the amount of the mortgage $2,000. This arrangement was carried out, and the old mortgage was entered of record as satisfied, and the mortgage and mortgage notes delivered up to the mortgagor.

It was urged in this case that the second mortgage was of record, and that the prior mortgagee, having constructive notice of it when he took the new mortgage, was not entitled to relief. "This position," says Mr. Justice Day, "proves too much. In order that a debt may attach as a lien prior to a mortgage, it must always, in some way, appear of record, so that in every case in which the claim is in a condition to be asserted in preference to the mortgage, the mortgagee has the means of ascertaining its existence. The argument, then, would amount to this: that a mortgage released in mistake could never be restored against a prior claim, which was in a condition to become a lien. In other words, that the lien of the mortgage could never be restored, except when the restoration is unnecessary and unimportant." See, also, Causler *v.* Sallis, 54 Miss. 446. See, however, § 927.

Beck, C. J., dissented, on the ground that the fact of the mistake was a matter of inference alone; and that relief could be had only against a mistake clearly made out by satisfactory proof; and that the mistake must be of some matter leading to and influencing the execution of the release.

gage not remaining as the evidence of that debt, but is released and the new one recorded on the same day, the new mortgage will have priority of any intervening incumbrance.[1]

If money is borrowed on a mortgage for the purpose of paying off a former mortgage of the same lands, the fact that an intervening judgment lien was overlooked in examining the title will not enable the mortgagee to set up in equity the former mortgage after it has been duly discharged.[2]

10. *Form and Construction of Discharge.*

972. Mode of effecting a discharge.[3] — Wherever a mortgage retains its common law character of a conveyance of the legal estate, a discharge should be effected either by a deed of reconveyance, or by an entry upon the records in the manner provided by statute. A receipt of the mortgagee, though executed under seal, while it is evidence of payment and of a discharge of the mortgage by reason of the payment, does not after breach of the condition revest the title in the mortgagor.[4] It is not even conclusive of payment, but is open to explanation.[5] A payment actually received may be regarded as an equitable release of the mortgage.[6] A mere verbal agreement by a mortgagee to execute a release, though made for a valuable consideration, cannot be enforced, as it is void under the statute of frauds.[7]

No precise formality in making a release of the lien of a mort-

[1] Shaver *v.* Williams, 87 Ill. 469; 18 Am. L. Reg. (N. S.) 132.

[2] Banta *v.* Garmo, 1 Sandf. (N. Y.) Ch. 383.

[3] In New England a common form of a deed of release to discharge a mortgage is as follows: "Know all men that I , of , the mortgagee named in (or the assignee of) a certain mortgage dated , and recorded , do hereby acknowledge that I have received from , the mortgagor named in said mortgage, full payment and satisfaction of the same; and in consideration thereof I do hereby cancel and discharge said mortgage, and release and quitclaim unto the said , and his heirs and assigns forever, the premises therein described. Witness my hand and seal this day of , 187 ."

If the discharge is indorsed upon the original mortgage, the following is sufficient: —

"Know all men, that having received full payment of the debt secured by this mortgage, I do hereby cancel and discharge the same, and release and quitclaim to the within named mortgagor and his heirs all right in and to the within described real estate. Witness," &c.

[4] See Allard *v.* Lane, 18 Me. 9.

[5] Perkins *v.* Pitts, 11 Mass. 125; Porter *v.* Hill, 9 Ib. 34; Parsons *v.* Welles, 17 Ib. 419; Pearce *v.* Savage, 45 Me. 90.

[6] Marriott *v.* Handy, 8 Gill (Md.), 31.

[7] Leavitt *v.* Pratt, 53 Me. 147; Phillips *v.* Leavitt, 54 Me. 405; Parker *v.* Barker, 2 Met. (Mass.) 423; Maynard *v.* Hunt, 5 Pick. (Mass.) 240; 6 Ib. 488. See, however, Malins *v.* Brown, 4 N. Y. 403.

gage is necessary. It may be effected by a reconveyance, although the only mode provided by statute is for the entry of satisfaction upon the margin of the record. But this method is not exclusive. Release may be made of the whole or of a part of the mortgaged premises by a quitclaim deed from the mortgagee to the mortgagor.[1]

Ordinarily a deed of release or quitclaim by the mortgagee to the mortgagor, or to the owner of the equity of redemption, will discharge the mortgage, although the mortgagee has also acquired some other claim or title to the premises, as, for instance, the equity of redemption, upon which the deed might operate. The deed would pass his entire title.[2] But the instrument will be construed according to the intention as manifested by the whole instrument; and therefore where a mortgagee holding an independent title by a subsequent mortgage indorsed upon his prior mortgage a discharge, whereby he "released and forever quitclaimed" all his "right, title, and interest in and to the within described premises," it was held that his release passed only his interest in that mortgage and not his entire interest. The natural import of the words used was satisfied by confining the effect of the release to the mortgage upon which it was written.[3] But a mere attachment which has not ripened into a title would not be discharged by a mortgagee's release of all his "right, title, claim, and demand whatever" in the mortgaged premises.[4] The mortgagee's release to a subsequent mortgagee without any transfer of the debt operates as a discharge of the prior mortgage.[5] If a mortgagee at the request of the owner of the equity of redemption, who is about to sell the premises, execute to the purchaser a bond, conditioned that the vendor should save the grantee harmless from all cost and damage in consequence of any previous incumbrance upon the premises, the effect of the bond is to release the land from his mortgage.[6]

973. When a mortgagee has received payment of a mortgage debt after maturity, without releasing the mortgaged premises, wherever the common law view that he holds the legal estate prevails he becomes a trustee of the mortgagor, and so

[1] Waters *v.* Jones, 20 Iowa, 363.

[2] Woodbury *v.* Aikin, 13 Ill. 639.

[3] Barnstable Savings Bank *v.* Barrett, 122 Mass. 172. See § 824.

[4] Lacey *v.* Tomlinson, 5 Day (Conn.), 77.

[5] Hill *v.* West, 8 Ohio, 222.

[6] Proctor *v.* Thrall, 22 Vt. 262.

holds the title until he releases it.[1] He has of course no equitable interest; but he is liable to the penalties imposed by statute for not discharging the mortgage after being in fact paid; and he is moreover liable to an equitable suit to compel a discharge or reconveyance.[2] He holds the legal seisin in trust for the mortgagor, and the court will not permit him or those claiming under him to set up this legal estate to defeat the possession of the *cestui que trust*. The equitable estate of the mortgagor, which in courts of equity is always recognized, and is protected in a great many ways, in courts of law obtains recognition by the fiction of regarding the mortgagee, after his debt is satisfied, as a trustee of the legal estate for the mortgagor. Until the debt is paid, the legal seisin of the mortgagee is but a mere formal title, and no trust will be raised for the benefit of the mortgagor until the purposes for which the mortgage was made is answered.[3]

974. Where a mortgage is regarded as merely a lien upon the land and not a conveyance of the legal estate, a discharge may be made without a deed; a writing not under seal is sufficient;[4] and payment without any writing in fact discharges the mortgage. Even an agreement to discharge made for a sufficient consideration, when the debtor has fulfilled his part of the agreement, may operate as a discharge, upon the ground that equity treats as done that which a party has agreed to do; therefore where the mortgagee agreed verbally to cancel and discharge his mortgage in consideration that the mortgagor would discharge a debt due him from a third person, and the mortgagor discharged his claim, it was held that the mortgage was thereby discharged.[5] Upon the same principle it is held that a mortgage given in part payment of the price of other land, which by agreement is to be conveyed to the mortgagor upon the cancelling of that agreement by mutual consent, is itself annulled and discharged unless it be expressly saved and continued.[6]

[1] Armstrong *v.* Peirse, 3 Burr. 1898; Robinson *v.* Cross, 22 Conn. 171; Den *v.* Dimon, 10 N. J. L. (5 Halst.) 156; Wolfe *v.* Dowell, 21 Miss. 103; Smith *v.* Otley, 26 Miss. 291; McNair *v.* Picotte, 33 Mo. 57.

[2] McNair *v.* Picotte, *supra*.

[3] Harrison *v.* Eldredge, 2 Halst. (N. J.) 407, per Ch. J. Kinsey; Shields *v.* Lozear, 24 N. J. L. 496, per Depue, J.

[4] Headley *v.* Goundry, 41 Barb. (N. Y.) 279; Ackla *v.* Ackla, 6 Pa. St. 228; Wentz *v.* Dehaven, 1 S. & R. (Pa.) 312; Wallis *v.* Long, 16 Ala. 738; and see Thornton *v.* Irwin, 43 Mo. 153.

[5] Griswold *v.* Griswold, 7 Lans. (N. Y.) 72; and see Swain *v.* Seamens, 9 Wall. 254.

[6] Eveland *v.* Wheeler, 37 N. Y. 244.

Anything which amounts to payment or satisfaction of the debt discharges the mortgage lien. If a judgment for the debt be satisfied out of other property of the debtor, the mortgage is discharged; and if one afterwards purchases the property in good faith, relying upon the records as showing that the execution had been returned as satisfied, no inquiry can be made as against him as to the regularity of the proceedings in which the judgment was obtained.[1] When the purposes of a trust deed are accomplished, the owner of the land, without any action on his part, is vested with the legal title, and can maintain ejectment upon it.[2]

975. In case of a mortgage of indemnity. — When indemnity has in fact been obtained, although not by a compliance with the terms of the contract between the parties, or in the way contemplated by them, the object of the mortgage being substantially and fully accomplished, the mortgage is extinguished.[3]

976. Whether a general release from all claims and demands whatever, made by the holder of a mortgage to the mortgagor, releases the mortgage debt or not, depends upon the intention of the parties. That the mortgage debt was not due at the time, and that the mortgage was not delivered up or cancelled, are reasons for supposing that the intention was not to release the mortgage debt.[4] A mortgage is discharged by the creditor's joining with others in a release under seal, whereby, for value received and in consideration of one dollar, he releases the debtor from indebtedness, "whether on book account, note of hand, or any other way."[5]

It is competent for a mortgagee who has signed a general release or a composition paper in behalf of the mortgagor to show, by parol evidence, that at the time of such release he was not the owner of the mortgage, having previously sold it; or he may, in the same way, show that the validity of the release was dependent upon a consideration which has not been fulfilled.[6]

977. Surrender of defeasance. — When a mortgage has been made by giving an absolute deed and taking back a defeasance, if this has not been recorded the parties may afterwards, with the

[1] Driggs *v.* Simson, 3 Thomp. & C. (N. Y.) 786.

[2] McNab *v.* Young, 81 Ill. 11.

[3] Archambau *v.* Green, 21 Minn. 520.

[4] McIntyre *v.* Williamson, 1 Edw. (N. Y.) 34.

[5] Van Bokkelen *v.* Taylor, 62 N. Y. 105, reversing S. C. 2 Hun, 138.

[6] Van Bokkelen *v.* Taylor, 4 Thomp. & C. 422.

intent to vest the estate unconditionally in the grantee by force of the deed, surrender and cancel the defeasance, and the estate will thereupon become absolute in the mortgagee, without any further act, if the transaction be fairly conducted and no rights of third parties have intervened.[1] But the assignment of the bond of defeasance to an assignee of the mortgage has been held not to operate as an extinguishment of the equity of redemption; but the decision is questioned, and it is difficult to see why such assignment should not have effect equally with a mere surrender.[2] When the debtor has paid a mortgage made in the form of an absolute conveyance, and the defeasance has not been recorded or rests in parol, the only relief is in a reconveyance, which the grantee may in equity be compelled to execute.[3]

If such transactions occur between the parties as would render it inequitable that the grantor should redeem, that itself in such case operates as a cancellation of the defeasance, and gives the deed the effect of an original absolute conveyance.[4]

978. The mortgage lien may of course be cut off by proper proceedings had for that purpose under a prior incumbrance. If the mortgagor, however, acquire such prior title, he would generally be estopped, under the covenants of his mortgage, to set it up. But if a purchaser from the mortgagor who has simply bought the estate subject to the mortgage, without assuming to pay it, acquires such prior title, an intervening mortgage is cut off, as much as it would be if the purchase had been made by some one having no interest in the estate.[5] Even if the purchaser at the foreclosure sale pays no money, but takes a deed and treats the subsequent mortgage as a lien and continues to pay interest on it, his recognition of it binds only himself and those who have notice. If he afterwards conveys the premises by warranty deed for a valuable consideration, a purchaser without notice takes the entire title free from the lien of the subsequent mortgage.[6]

979. A verbal agreement to release a mortgage, to be sus-

[1] Harrison *v.* Phillips Academy, 12 Mass. 456; Rice *v.* Bird, 4 Pick. (Mass.) 350, note; Green *v.* Butler, 26 Cal. 595.

[2] Porter *v.* Millet, 9 Mass. 101. See §§ 252–255.

[3] Kenton *v.* Vandergrift, 42 Pa. St. 339; Sherwood *v.* Wilson, 2 Sweeny (N. Y.), 684.

[4] West *v.* Reed, 55 Ill. 242.

[5] McCammon *v.* Worrall, 11 Paige (N. Y.), 99; and see Bullard *v.* Leach, 27 Vt. 491. See § 748.

[6] Wood *v.* McClughan, 4 Thomp. & C. (N. Y.) 420.

tained, should be established beyond a reasonable doubt. An owner of land being desirous of selling it went with the purchaser to the mortgagee, who verbally agreed to surrender the mortgage for other security, and told the purchaser to go on and complete the purchase, as he had made an arrangement with the mortgagor in relation to the mortgage debt. The purchase having been made, the mortgagee failed to surrender the mortgage, whereupon the purchaser sought to compel him to cancel it. The evidence being contradictory, and not showing that other security had been given or offered, relief was refused.[1]

980. A release of a mortgage may be limited in its operation to a particular person, or to a particular demand, so as merely to give priority to that particular person or demand over the mortgage, and leave it unaffected as to others. Thus where a mortgagee, in pursuance of a stipulation made in the mortgage to that effect, gave a release in favor of the United States to enable the mortgagor to commence the distillery business, which stipulated, "that the lien of the United States for taxes and penalties should have priority of said above mentioned mortgage, and in case of the forfeiture of the distillery premises, or any part thereof, the title shall vest in the United States, discharged from said mortgage, and for that purpose the said party of the first part does hereby remise and release" the mortgaged premises, it was held, as against a party claiming title under a junior incumbrance, that the instrument did not operate as a general release of the premises from the prior mortgage, but that its only effect was to give the government a priority of lien.[2]

981. The release of a portion of the mortgaged premises, upon the payment of proper consideration, does not discharge or affect the mortgage lien upon other portions of the land, although they have previously been sold;[3] and the mortgagee having no notice of the prior conveyance of other portions of the premises may release to a subsequent purchaser, and the lien of the mortgage upon the land of the prior purchaser will not be affected, although he received no payment in reduction of the mortgage debt for the release.[4] If the release be made to a third person, the mortgagor can claim no benefit from it, even as a

[1] Stevenson *v.* Adams, 50 Mo. 475.

[2] Flower *v.* Elwood, 66 Ill. 438.

[3] Evertson *v.* Ogden, 8 Paige (N. Y.), 275. See §§ 722–729.

[4] Patty *v.* Pease, 8 Paige (N. Y.), 277.

discharge of that part of the land. The release in such case merely transfers the interest of the mortgagee in that portion of the mortgaged premises to his grantee.[1]

As between the parties to the mortgage, and without reference to intervening rights, the mortgagee may release any portion of the mortgaged property without impairing his lien upon the remainder.[2] There is no obligation on his part to first exhaust his remedy on the other realty before enforcing his claim upon a portion of the mortgaged premises which is the debtor's homestead. He may, after the debtor has parted with all the balance of the mortgaged estate except the homestead, release such other realty and still maintain his lien on the homestead. Where a debtor after mortgaging his homestead and other land was thrown into bankruptcy, and the homestead was assigned and set over to the debtor, and the assignees on their application were ordered to sell the other realty, and they sold one piece of it to the mortgagee in part payment of the mortgage, and he released other parcels except the homestead to the assignees, it was held that these transactions did not satisfy and cancel the whole mortgage, but that the mortgagee might enforce it for the balance of the claim against the homestead.[3]

982. The effect of a mortgagee's making a partial release when he has actual notice of a subsequent incumbrance upon another part is elsewhere considered;[4] but it should be stated in this connection, that a release so made discharges *pro tanto* his own claim upon the property as against any third person interested in any part of the remainder of the property. But it is universally held that the mere recording of a subsequent conveyance or incumbrance is not notice to the prior mortgagee; he is affected only by actual notice.[5]

[1] Wyman *v.* Hooper, 2 Gray (Mass.), 141; Grover *v.* Thatcher, 4 Ib. 526.

[2] Coutant *v.* Servoss, 3 Barb. (N. Y.) 128.

[3] Chapman *v.* Lester, 12 Kans. 592.

In Iowa it is provided by statute that the homestead shall be sold only to supply the deficiency remaining after exhausting the other property of the debtor liable to execution, in case of a debt contracted prior to the purchase of the homestead, or to supply the deficiency remaining after exhausting the other property pledged for the payment of the debt in the same written contract, in case of a debt for the payment of which the homestead is expressly made liable. Code, 1873, §§ 1992, 1993; and see Dickson *v.* Chorn, 6 Iowa, 19; Twogood *v.* Stephens, 19 Iowa, 405.

[4] §§ 722–729.

[5] See §§ 562, 723; also, Birnie *v.* Main, 29 Ark. 591, and cases cited; Hoy *v.* Bramhall, 19 N. J. Eq. 74, 563; Johnson *v.* Rice, 8 Me. 157; Deuster *v.* McCamus,

Upon the same principle, after the mortgaged premises have passed to several devisees, if the mortgagee releases one devisee's portion the others are liable only for that share of the debt for which their portion would be liable had no release been made.[1] And so if the mortgagee releases the mortgagor from personal responsibility for the debt, after notice of his conveyance of a part of the premises to a purchaser, the purchaser's security is thereby diminished, and it is therefore held that the portion he has purchased is discharged from the lien of the mortgage.[2]

Owners of those portions of the mortgaged estate not released cannot claim an entire release of their own property from the mortgage lien, because of a partial release of the mortgaged property; but they must in every case pay their fair proportion of the mortgage debt. The mortgage security at most is affected only to the extent of the value of the property released.[3]

983. The personal liability of the mortgagor may be released without extinguishing the mortgage, if this be done without any intention of discharging the debt.[4] Such a release of personal liability is sometimes made when the mortgagor has sold the premises to another who has assumed the payment of the debt, and the mortgagee is willing to look to the latter and the property for the satisfaction of his claim.[5] This release is personal merely, and does not discharge the debt or the mortgage. Whether the intention in any case was to discharge the debt or merely the personal liability is a question of fact, depending upon the circumstances of the case or the construction of the release.[6] A release from the debt without limitation is generally a discharge of the mortgage, because the debt is the principal thing, and when that is discharged the mortgage is discharged along with it.[7]

14 Wis. 307; Iglehart *v.* Crane, 42 Ill. 261; Patty *v.* Pease, 8 Paige (N. Y.), 277; Taylor *v.* Short, 27 Iowa, 361; Waters *v.* Waters, 20 Iowa, 363; Howard Ins. Co. *v.* Halsey, 4 Sandf. (N. Y.) 565; 8 N. Y. 271; Trustees of Union College *v.* Wheeler, 61 N. Y. 88.

[1] See §§ 722–728; Gibson *v.* McCormick, 10 Gill & J. (Md.) 65.

[2] Coyle *v.* Davis, 20 Wis. 564.

[3] Frost *v.* Koon, 30 N. Y. 428; Stuyvesant *v.* Hall, 2 Barb. (N. Y.) Ch. 151; Stevens *v.* Cooper, 1 Johns. (N. Y.) Ch. 425; Guion *v.* Knapp, 6 Paige (N. Y.), 35; Williams *v.* Wilson, 124 Mass. 257.

[4] Donnelly *v.* Simonton, 13 Minn. 301; and see Hayden *v.* Smith, 12 Met. (Mass.) 511.

[5] Bentley *v.* Vanderheyden, 35 N. Y. 677.

[6] Tripp *v.* Vincent, 3 Barb. (N. Y.) Ch. 614.

[7] See § 727; Armitage *v.* Wickliffe, 12 B. Mon. (Ky.) 488.

If the mortgage note be given up by the mortgagee to be cancelled without a release of the mortgage, and the mortgagor releases the land to him, the transaction is open to the inquiry, whether the purpose of it was to discharge the mortgage or merely to release the mortgagor from personal liability.[1] If the debt was not in fact paid, and the land was still to be charged with it, the mere giving up of the note would not discharge the mortgage.

The surrender of the mortgage note in consideration of a release of the equity of redemption does not necessarily discharge the mortgage lien. As against an intermediate incumbrance, this transaction would be held to operate merely as a relinquishment of the personal obligation of the mortgagor, and not as a satisfaction of the mortgage.[2] In like manner where a mortgagee, who has acquired the equity of redemption from one who had purchased it from the mortgagor and assumed the payment of the mortgage, releases all claims and demands arising by virtue of that agreement, neither the mortgage debt nor lien is discharged.[3]

984. Although payment of the debt is in effect a discharge of the mortgage, a release of the security does not of itself discharge the debt.[4] A deed of release in the ordinary form, as well as an entry of satisfaction upon the margin as usually made, contains an express acknowledgment of the payment of the debt; and in such case this would be *primâ facie* evidence of the discharge of the debt, and perhaps conclusive evidence of it, unless fraud or mistake be shown in making such entry or release.[5] But this is otherwise if the release contains no such recital; although if the purpose be to release the security without releasing the debt this should be distinctly stated. If after an entry of satisfaction the debtor continues to pay interest upon the same debt, and the creditor continues in possession of the mortgage bond or note, the presumption of payment arising from such entry is rebutted.[6] If the mortgage note be left outstanding, and there is no evidence

[1] Hemenway *v.* Bassett, 13 Gray (Mass.), 380.

[2] Baldwin *v.* Norton, 2 Conn. 161.

[3] Knowles *v.* Carpenter, 8 R. I. 548.

[4] Van Deusen *v.* Frink, 15 Pick. (Mass.) 449; Sherwood *v.* Dunbar, 6 Cal. 53; Edgington *v.* Hefner, 81 Ill. 341.

[5] Wade *v.* Howard, 11 Pick. (Mass.) 289, 297; Chappell *v.* Allen, 38 Mo. 213; Fleming *v.* Parry, 24 Pa. St. 47; and see Cross *v.* Stahlman, 43 Pa. St. 129.

[6] Fleming *v.* Parry, *supra*.

that the release was intended to operate as payment of the note, the mortgagee may still collect or negotiate the note.[1]

985. **The effect of a release or discharge of a mortgage upon the title of the person to whom the release is made** is in general merely to extinguish the mortgage lien, and to leave his title just as if the mortgage had never existed. Sometimes, in order to protect the person who has paid for the release, it is necessary to regard the mortgage title as still subsisting in him; but this is exceptional when the release is made to the owner of the equity of redemption. Where a mortgagor and mortgagee had joined in making a second mortgage to another person, who afterwards entered for the purpose of foreclosure, and after the lapse of three years and more made a deed of release to them, the effect of it was held to be merely to replace the estate in them as they held it before making the second mortgage, and to restore them to the original relation of mortgagor and mortgagee.[2]

986. **A mortgagee who stands by at a sale of a part or the whole of the premises by the mortgagor,** and acquiesces in a sale of the entire title to the property without making known his mortgages and receives the price, cannot set up his mortgage against the purchaser; as to him the mortgage is discharged.[3] In like manner if he permit the mortgagor to sell the mortgaged land, under the promise to pay him from another fund, the purchaser takes the land discharged of the mortgage, although the mortgagee obtains nothing from such fund.[4]

987. **Release wrongfully obtained.** — Where a release was executed and sent to an agent to be delivered upon payment of the debt, and the owner of the property procured possession of it upon a promise to pay the sum due in a few weeks, which he neglected to do, it was held that the release was inoperative, and could not take effect until payment of the mortgage debt.[5]

The entry of satisfaction of the mortgage upon the record will protect a subsequent *bonâ fide* purchaser of the land from the mortgagor, although the mortgagee had negotiated the mortgage note to a third person, if the purchaser had no notice that the note

[1] Van Deusen *v.* Frink, 15 Pick. (Mass.) 449.

[2] Baylies *v.* Bussey, 5 Me. 153.

[3] M'Cormick *v.* Digby, 8 Blackf. (Ind.) 99; Curtiss *v.* Tripp, Clarke (N. Y.), 318.

[4] Taylor *v.* Cole, 4 Munf. (Va.) 351.

[5] Hale *v.* Morgan, 68 Ill. 244.

was not paid,[1] and is not chargeable with notice through neglect to require the surrender of it.

A forged release does not, of course, affect the mortgage lien. It is not necessary that the mortgagee should execute and record any instrument to counteract the forgery, though it would be prudent for him to give such notice. It would be his duty, however, to inform all persons who might apply to him for information that the release is a forgery.[2] Neither is it necessary that he should, within any particular period, commence proceedings at law or in equity against the forger, or any one claiming under him, to vindicate his title. He may rest upon the strength of his title.[3]

988. The debtor who demands a release of a mortgage should tender the instrument to be executed and also the expenses of its execution;[4] and if satisfaction be entered upon the margin of the record he should offer to pay the expenses of this.

11. *Entry of Satisfaction of Record.*

989. Provision is generally made for the discharge of a mortgage when paid, either by a brief entry upon the margin of the record of the mortgage signed by the holder of it, or by his executing a certificate of satisfaction, which is recorded at length with a proper reference to and from the record of the mortgage. An abstract of the statutory provisions for the discharge of mortgages is here given. In general, it may be said that the entry or certificate provided for may be made by the person who is authorized to receive payment of the mortgage, or who could properly execute a deed of release of the premises.

These statutes generally provide also for the recovery of a pen-

[1] See § 472; Cornog *v.* Fuller, 30 Iowa, 212; Bank of Indiana *v.* Anderson, 14 Iowa, 544; Ayers *v.* Hays, 60 Ind. 452.

[2] Chandler *v.* White, 84 Ill. 435.

[3] Chander *v.* White, *supra;* Meley *v.* Collins, 41 Cal. 663. On the other hand, in Costello *v.* Meade, 55 How. Pr. (N. Y.), the Supreme Court of New York, in a case where a forged satisfaction of a mortgage had been executed and filed in the register's office, and the mortgage marked satisfied of record, and the mortgage was afterwards assigned to a *bonâ fide* purchaser, and afterwards the premises were purchased by a person relying upon the record that the mortgage had been discharged, held that the assignee could not enforce his mortgage, because he had not, as soon as he discovered the forgery, taken steps to correct the record or enforce his mortgage, the purchaser, through his silence and inactivity being justified in dealing with the property as though the mortgage had been properly discharged.

[4] See Pettengill *v.* Mather, 16 Abb. (N. Y.) Pr. 399.

alty from the person who has refused or neglected to discharge a mortgage after having received payment of it. This is a means of compelling a discharge, in addition to the relief that may be had under the general jurisdiction of courts of equity.[1]

990. An action for the recovery of the statutory penalty for neglecting to discharge a mortgage is a penal action, and calls for a strict construction.[2] The action should be brought against the person who has the power legally to discharge the mortgage, whether he be the mortgagee or an assignee or other holder of the mortgage.[3] It is erroneous when an assignee holds the mortgage to join with him in the action the mortgagee, or any one else who could not execute satisfaction of the mortgage.[4] When the mortgage is in the form of a trust deed, the trustee, being the person who has the authority to enter satisfaction, is the one liable for neglect or refusal to do so. Where an assignee of a mortgage has negligently omitted to provide himself with authority to satisfy a mortgage of record on payment of the debt, he is liable for the costs of a suit instituted to obtain a judicial satisfaction of it.[5]

As a mortgage to several persons who are partners may be discharged by any one of them, a request to one is sufficient, and all the members are jointly liable to the penalty for failure of one to enter satisfaction.[6]

After the penalty for neglecting to discharge a mortgage of record after request has been once incurred, a subsequent entry of satisfaction, even if entered before suit is brought for the penalty, is no defence;[7] neither is it any defence that the mortgagor has subsequently conveyed the land to the mortgagee, and the deed has been recorded.[8]

991. The holder of a mortgage renders himself liable to the statutory penalty for refusing to release a mortgage upon a sufficient tender, although he claims that the tender is insufficient, and it so appears from the mortgage note by a strict computation, if in fact it be sufficient; as, for instance, where the holder

[1] Barnes *v.* Camack, 1 Barb. (N. Y.) 392; Beach *v.* Cooke, 28 N. Y. 508; Sutherland *v.* Rose, 47 Barb. (N. Y.) 144; Beecher *v.* Ackerman, 1 Abb. (N. Y.) N. S. Pr. 141.

[2] Stone *v.* Lannon, 6 Wis. 497.

[3] Ewing *v.* Shelton, 34 Mo. 518.

[4] Galloway *v.* Litchfield, 8 Minn. 188.

[5] Hillman *v.* Stumph, 1 Wils. (Ind.) 285.

[6] Renfro *v.* Adams (Ala.), 2 South. L. J. 207.

[7] Deeter *v.* Crossley, 26 Iowa, 180.

[8] Deeter *v.* Crossley, *supra.*

of the mortgage took it after its maturity, and after several payments had been made, with the understanding between the parties that they were in full satisfaction of the yearly interest, although by reason of being made after the time when the interest was due these payments, if applied at large, would not have the effect of fully satisfying the interest.[1]

The statutory penalty for refusing to discharge a mortgage after a proper tender and request applies to all mortgages, whether large or small; and it is immaterial that the amount of the penalty is more than the amount due on the mortgage.[2] It is immaterial, too, whether the mortgage is paid voluntarily or is enforced by suit. The penalty may just as well be enforced when the mortgage is paid upon a judgment.[3]

But it has been held that in an action for not entering satisfaction on a mortgage the jury may and should consider whether the refusal to discharge it was wanton and oppressive, or the result of an honest doubt.[4] It is doubted whether this broad statement would be generally sustained under the statutes now in force; but the mortgagee will never be adjudged liable to a penalty for refusing to discharge a mortgage if he has in fact any substantial ground for so refusing; as, for instance, when he can justify his refusal on the ground that although the mortgage debt had been paid, the costs of a suit brought by him to enforce the payment had not been paid.[5] Nor will the statutory penalty be imposed when there has been an honest difference between the parties regarding their rights.[6] But a mortgagee incurs the penalty if his failure to enter satisfaction resulted from inadvertence or indifference, although it was not wilful and intentional.[7] No recovery can be had when the mortgage has not actually been paid, but the mortgagee has united the legal and equitable estates in himself by purchasing the equity of redemption.[8]

In an action for the penalty it appeared that the purchaser of land subject to a mortgage made by another, after paying the mortgage debt requested the mortgagee to discharge it of record.

[1] Barnard *v.* Harrison, 30 Mich. 8.

[2] Collar *v.* Harrison, 28 Mich. 518.

[3] Verges *v.* Giboney, 47 Mo. 171. See Lewis *v.* Conover, 21 N. J. Eq. 230.

[4] Haubert *v.* Haworth, 9 Phila. (Pa.) 123.

[5] Emerson *v.* Gilman, 44 N. H. 235. And see Lewis *v.* Conover, 21 N. J. Eq. 230.

[6] Burrows *v.* Bangs, 34 Mich. 304.

[7] Renfro *v.* Adams (Ala.), 2 South. L. J. 207.

[8] Phelps *v.* Relfe, 20 Mo. 479.

The latter thereupon gave a satisfaction piece to the mortgagor, but it was never recorded, and when the owner of the land again applied to him to execute a discharge, he said nothing of his having executed such an instrument, and neglected to execute another. The jury were correctly instructed that if they believed the satisfaction piece was given to the mortgagor to be kept in his pocket, and to be used as a defence to an action for the penalty, and not to be recorded as a discharge of the mortgage, it was a fraud upon the owner, and no defence to the action; and moreover that the fraud might be inferred from the circumstances.[1]

Matters of excuse or justification of refusal to enter satisfaction must be specially pleaded and cannot be given in evidence under a general denial.[2]

12. *Statutory Provisions for Entering Satisfaction of Record.*

992. Alabama.[3] — A mortgagee, upon receiving satisfaction of the amount secured by the mortgage, must, if it has been recorded, at the request of the mortgagor, enter satisfaction upon the margin of the record of it, which operates as a release of the mortgage and a bar to all actions upon it. A penalty of two hundred dollars is attached to the neglect of a mortgagee to do this for three months after such payment and request.

992 *a*. Arizona Territory.[4] — Any recorded mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee or his personal representative or assignee, acknowledging the satisfaction of the mortgage, in the presence of the recorder or his deputy, who shall subscribe the same as a witness, and such entry has the same effect as a deed of release duly acknowledged and recorded. Any mortgage may also be discharged upon the record thereof by the recorder in whose custody it may be, whenever there shall be presented to him a certificate executed by the mortgagee, his personal representative or assignee, acknowledged, or proved and certified, as required to entitle conveyances to be recorded, specifying that such mortgage has been paid, or otherwise satisfied and discharged. Every such certificate, and the proof or acknowledgment thereof, must be recorded at full length, and a reference made to the book containing such record, in the minutes of the discharge of such mortgage,

[1] Eaton *v.* Copeland, 17 Wis. 218.
[2] Petty *v.* Dill, 53 Ala. 641.
[3] Code, 1876, §§ 2222, 2223.
[4] Compiled Laws, 1877, §§ 281–284.

made by the recorder upon the record thereof. If any mortgagee, or his personal representatives or assignee, as the case may be, after a full performance of the conditions of the mortgage, whether before or after a breach thereof, shall, for the space of seven days after being thereto requested, and after tender of his reasonable charges, refuse or neglect to execute and acknowledge a certificate of discharge or release thereof, he is liable to the mortgagor, his heirs or assigns, in the sum of one hundred dollars, and also for all actual damages occasioned by such neglect or refusal.

993. Arkansas.[1] — Upon receiving satisfaction for the amount due on a mortgage, the mortgagee must upon request acknowledge satisfaction upon the margin of the record; and if he does not do this within sixty days after such request, he forfeits to the party aggrieved any sum not exceeding the amount of the mortgage money, to be recovered by civil action. This acknowledgment of satisfaction has the effect to release the mortgage and revest in the mortgagor, or his representatives, the title to the mortgaged property. If payment be made to the officer before sale, he is required to make and acknowledge and record a certificate thereof, which has the same effect as satisfaction entered on the margin of the record.

994. California.[2] — A recorded mortgage may be discharged by an entry in the margin of the record, signed by the mortgagee, or his personal representative or assignee, acknowledging satisfaction in the presence of the recorder, who must certify the acknowledgment substantially as follows: "Signed and acknowledged before me, this day of , in the year . A. B., Recorder." If not discharged in this manner, it must be discharged upon the record by the officer, on presentation of a certificate signed by the mortgagee, his representative, or assign, acknowledged or proved, stating that the mortgage has been paid or discharged. The certificate is recorded at length with reference to and upon the record of the mortgage. The mortgagee must immediately upon request enter satisfaction, or make a discharge of the mortgage in such form as to entitle it to be recorded, and upon his neglect or refusal to do so is liable for all damages which the mortgagor or his grantee may sustain by reason of such re-

[1] Dig. of Stat. 1874, §§ 4290–4293, p. 771.

[2] Civil Code, §§ 2938–2941, amended.

fusal, and also forfeits to him the sum of one hundred dollars, to be recovered in a civil action.

995. Colorado.[1] — When the mortgagee of any property within the state receives payment of the money due to him, and secured by mortgage, and enters satisfaction or a receipt for the same, either on the mortgage or on the record of the mortgage, such satisfaction or receipt so recorded operates to release the mortgage to the person entitled to a release, and reconveys the title of any property in any mortgage as fully as a release deed would have done, executed under the formalities prescribed by the law regulating conveyances. The clerk and recorder of each county, when recording a mortgage, is required to leave a space on the margin of the record for the entry of satisfaction, and to record therein the satisfaction made on said mortgage, or to permit the mortgagee to enter therein the satisfaction of the mortgage, which record has the same force and effect as the record of a release deed of said mortgagee.

996. Connecticut.[2] — Upon the satisfaction of a mortgage the mortgagee, or person by law authorized to release the same, must execute and deliver a deed of release; and if he neglect so to do for thirty days after a written request, and the tender of the necessary expense, he is liable to pay to any person aggrieved five dollars for each week of such neglect after thirty days. The executor or administrator of any deceased mortgagee, and any guardian or conservator of a mortgagee, may release the legal title to the mortgagor or party entitled to the release.

997. Dakota Territory.[3] — A recorded mortgage may be discharged in the margin of the record by the mortgagee, his personal representative or assignee, in the presence of the register, or by the register, on presentation to him of a certificate signed by the mortgagee or such other person, acknowledged, or proved and certified, stating that the mortgage has been satisfied. This certificate is recorded at length, and a reference made in the record to the book and page where the mortgage is recorded, and in the minute of the discharge made upon the record of the mortgage, to the book and page where the discharge is recorded. By failure so to discharge on request, a penalty of one hundred dollars is incurred, and also all damages which may result.

[1] Gen. Laws, 1877, §§ 1847, 1849.

[2] Gen. Stat. 1875, p. 355, §§ 21, 22.

[3] Civil Code, 1877, § 1735.

998. Delaware.[1] — When a mortgage debt is satisfied the legal holder of the mortgage must within sixty days afterwards cause an entry of satisfaction to be made upon the record, signed by him, or when a corporation is the holder, by the cashier or treasurer, and attested by the recorder. Such entry extinguishes the mortgage. A neglect or refusal on the part of the holder of the mortgage so to discharge it renders him liable in damages of not less than ten, nor more than five hundred dollars, except when special damage to a larger amount is alleged and proved, to be recovered by action. Upon request a reconveyance of the premises embraced in such mortgage, or in a conveyance in the nature of a mortgage, must be executed.

999. District of Columbia. — Deeds of trust are taken as security for debts almost to the exclusion of mortgages. Release is made by a deed from the trustee. There is no statutory provision for cancellation upon the record.

1000. Florida.[2] — Whenever the amount of money due on any mortgage shall be fully paid to the person or party entitled to the payment thereof, the mortgagee, or party to whom such payment shall have been made, shall, within sixty days thereafter, enter on the margin of the record of said mortgage, in the presence of the custodian of said record, to be attested by said custodian, satisfaction of said mortgage, and sign the same with his, her, or their hand, or shall make and execute in writing an instrument acknowledging satisfaction of said satisfied mortgage, and have the same entered of record in the book of mortgage records in the proper county, the said instrument to be first legally acknowledged or proven to be the act and instrument of the party or parties making the same.

1001. Georgia. — It is customary to discharge recorded mortgages by a written certificate entered upon the record by the clerk. A deed of release may also be used.

1002. Idaho Territory.[3] — Mortgages may be discharged by an entry on the margin of the record, signed by the mortgagee, or his personal representative or assignee, acknowledging satisfaction of the mortgage, in the presence of the recorder or his deputy, who must subscribe the same as a witness; and such entry has the same effect as a deed of release duly acknowledged and

[1] Rev. Code, 1874, p. 506.
[2] Laws, 1877, c. 3013.
[3] Rev. Laws, 1875, p. 603.

recorded. A discharge may also be made upon the record by the recorder, whenever there shall be presented to him a certificate executed by the mortgagee, his personal representative or assignee, duly acknowledged or proved, specifying that such mortgage has been paid or otherwise satisfied or discharged. The certificate is recorded at length, with a minute of reference to the record of the mortgage. A neglect or refusal of the holder of a satisfied mortgage for seven days after request to execute and acknowledge a certificate of discharge renders him liable to the mortgagor, his heirs or assigns, in the sum of one hundred dollars, and also for all actual damages occasioned by such neglect or refusal.

1003. Illinois.[1] — Upon satisfaction of a mortgage the mortgagee shall, at the request of the mortgagor or his assigns, enter satisfaction upon the margin of the record in the recorder's office. A mortgage or trust deed may also be released by an instrument in writing, acknowledged or proved in the same manner as a deed. If release is not made within one month after payment of the debt and tender of all reasonable charges, and a request for release, the person whose duty it is to make the release shall forfeit and pay to the party aggrieved the sum of fifty dollars, to be recovered in an action of debt.

1004. Indiana.[2] — The mortgagee, upon receiving full payment of the mortgage debt, shall, upon request, enter satisfaction on the margin, or other proper place in the record of the mortgage, which operates as a complete release and discharge of it. Instead of such entry a certificate of payment may be made, acknowledged and recorded, with proper references to the record of the mortgage. The executor or administrator of a deceased mortgagee may release and discharge the mortgage.[3]

1005. Iowa.[4] — When the amount due on a mortgage is paid, the mortgagee must acknowledge satisfaction in the margin of the record of the mortgage, or must execute an instrument in writing referring to the mortgage, and duly acknowledge it for record. If he fails to do so within sixty days after being requested he forfeits the sum of twenty-five dollars to the mortgagor.

1006. Kansas.[5] — A recorded mortgage may be discharged by

[1] R. S. 1877, c. 95, §§ 8, 9, 10.

[2] Revision, 1876, vol. 2, p. 334, §§ 5, 6. A tender merely of the amount due does not entitle the mortgagor to a discharge. Storey *v.* Krewson, 55 Ind. 397.

[3] Ib. 507, § 39.

[4] Code, 1873, § 3327.

[5] Dassler's Stat. 1876, c. 68, §§ 5–8.

an entry on the margin of the record, signed by the mortgagee, or his attorney, assignee, or personal representative, acknowledging satisfaction of the mortgage, in the presence of the register of deeds or his deputy, and subscribed by him as a witness. A mortgage may also be released by a receipt indorsed thereon, by the mortgagee, his agent or attorney, which receipt, when recorded on the margin of the record, has the same force and effect as an entry on the margin of the record. A mortgage may also be discharged upon the record by the register of deeds, whenever there is presented to him an instrument acknowledging satisfaction of the mortgage, executed by the mortgagee, his duly authorized attorney in fact, assignee, or personal representative, and duly acknowledged and certified, as other instruments affecting real estate. Such instrument is recorded at length, with reference to it in the record of the mortgage. Upon the satisfaction of a mortgage, it is the duty of the mortgagee or his assignee, immediately on demand, to enter satisfaction of record; and if he neglects to do so he is liable in damages to the mortgagor or his grantee in the sum of one hundred dollars, to be recovered in a civil action.

1007. **Kentucky.** — Liens by deed or mortgage may be discharged by an entry acknowledging satisfaction of the same on the margin of the record, signed by the person entitled or his personal representative, and attested by the clerk or his deputy, which shall have the effect to reinvest the title in the mortgagor, or grantor, or person entitled to it. There may also be a common law release.

1008. **Louisiana.**[1] — Mortgages are discharged by the fact of payment. The erasure of record is made on presentation to the recorder of the acts, receipts, and judgments which operate as a release of the mortgage, with the certificate of the notary public before whom the act was executed, stating by such act a release was granted and the erasure allowed; this certificate is filed in the office of the recorder of mortgages, where such cancelling is

[1] Rev. Civil Code, 1870, art. 3371–3385. The erasure can only be made by the mortgagee's consent or by decree. By no act of the recorder can the mortgage be destroyed. Guesnard *v.* Soulie, 8 La. Ann. 58. Neither does the cancellation of the mortgage by the recorder, on the presentation of a false certificate that the note had been paid, impair the rights of the mortgagee, although one has innocently bought the property on the faith of a certificate that there was no mortgage on the property. De St. Romes *v.* Blanc, 20 La. Ann. 424.

asked for. If the erasure has been given by an act under private signature, the erasure only takes place when it has been acknowledged by the mortgagee, or proved by the oath of one of the subscribing witnesses, unless the register be acquainted with the signature of the party who has subscribed the act, and shall agree on his own responsibility to make the erasure on the presentation of the original. If the debt be payable by instalments, the debtor may, on the payment of each instalment, require a release from the creditor in relation to the instalment paid; and the recorder shall make mention of these partial releases on the margin of the record; but he shall not erase the record entirely until the whole debt has been discharged.[1]

1009. **Maine.**[2] — A mortgage may be discharged by a deed of release from the person authorized to discharge it, or by causing satisfaction and payment under his hand to be entered in the margin of the record of such mortgage in the register's office. A guardian of a mortgagee may execute a discharge.

1010. **Maryland.**[3] — A release of a mortgage may be made in the following form, or to like effect: "I hereby release the above (or within) mortgage. Witness my hand and seal this day of . (Seal.)" This may be written by the mortgagee or his assignee upon the record in the office where the mortgage is recorded, and attested by the clerk of the court; or it may be indorsed on the original mortgage by the mortgagee or his assignee; and upon such mortgage, with the release, being filed in the office in which the mortgage is recorded, the clerk is required to record the release at the foot of the mortgage. When the mortgage, with the release, is filed for this purpose, the clerk retains it in his office, and does not permit it to be again withdrawn. A release may be made by an executor or assignee in the same manner and with like effect as by the mortgagee.

1011. **Massachusetts.**[4] — Mortgages may be discharged by an entry on the margin of the record in the registry of deeds, signed by the mortgagee, or his executor, administrator, or assignee, acknowledging the satisfaction of the mortgage; and such entry has

[1] An unauthorized cancellation by the recorder cannot impair the rights of the holder of the mortgage. Mechanics' Building Asso. *v.* Ferguson 29 La. Ann. 548. The holder of the mortgage may show that the recorder acted upon insufficient evidence. Horton *v.* Cutler, 28 La. Ann. 331.

[2] R. S. 1871, c. 90, §§ 25, 26.

[3] Code, 1860, art. 24, §§ 33–38.

[4] G. S. c. 89, §§ 30, 31.

the same effect as a deed of release duly acknowledged and recorded. When there are two or more joint holders of a mortgage, one of them may discharge it in either of these modes.[1] When the mortgagee or the holder of the mortgage is under guardianship, as an infant or otherwise, the guardian may, upon satisfaction of the debt, execute a release of the mortgage.[2] If the holder of a mortgage, after full performance of the condition, whether before or after breach, for seven days after being requested, and after a tender of his reasonable charges, refuses or neglects to make such discharge, or execute and acknowledge a deed of release, he is liable for all damages occasioned by such neglect or refusal, to be recovered in an action of tort.[3]

1012. Michigan.[4] — A mortgage may be discharged by an entry on the margin of the record, signed by the mortgagee or his personal representative or assignee, acknowledging satisfaction, in the presence of the register or his deputy, as a witness, and such entry has the effect of a deed of release. It may also be discharged upon the record by the register of deeds, when a certificate of payment, duly executed and acknowledged, is presented; or upon the presentation of the certificate of the circuit court of the county, under its seal, that it has been made to appear that the mortgage has been duly paid, or upon presentation of a certificate of the register in chancery of the county, certifying that a decree of foreclosure has been entered, and that the records of his office show that the decree has been satisfied.[5] A neglect or refusal for seven days, after payment and request and tender of reasonable charges, to discharge the mortgage, renders the person so neglecting or refusing liable to the mortgagor, his heirs or assigns, in the sum of one hundred dollars damages, besides all actual damages, to be recovered in an action upon the case, or upon a bill in equity to procure a discharge, with double costs.[6] Any person whose lands are incumbered by a mortgage that has been satisfied may petition the circuit court for the county, stating the facts and alleging that the residence of the holder of the mortgage cannot be ascertained, or that he is deceased, and three months and more having elapsed, the names of his representatives

[1] St. 1870, c. 171.
[2] G. S. c. 140, § 34.
[3] G. S. c. 89, § 31.
[4] Compiled Laws, 1871, pp. 1348, 1349.
[5] Laws, 1875, No. 47, p. 40.
[6] The penalty may be recovered in an action to redeem. Cowles *v.* Marble, 37 Mich. 158.

cannot be ascertained; and upon satisfactory proofs the court makes and delivers to the petitioner an attested certificate of the fact of payment and of the evidence establishing it.[1]

1013. Minnesota.[2] — Mortgages may be discharged by an entry in the margin of the record, signed by the mortgagee, or his executor, administrator, or assignee, acknowledging satisfaction; and such entry has the same effect as a deed of release duly acknowleged and recorded. They may also be discharged upon the record by the register of deeds whenever there shall be presented to him a certificate signed by the mortgagee or grantee, his personal representatives or assigns, duly executed and acknowledged, specifying that the mortgage has been paid or otherwise discharged. This certificate is recorded at length with a minute of reference to and from the record of the mortgage.

If the holder of the mortgage neglects for the space of ten days after being thereto requested, with tender of his reasonable charges to discharge the same, he is liable for all actual damages occasioned by his neglect or refusal, to be recovered in a civil action. In the same action may be united a claim for the satisfaction of the mortgage, which the court may decree, and a certified copy of the decree operates as a discharge. If the mortgagee be a non-resident, the action may be maintained at the expiration of sixty days after the conditions of the mortgage have been fully performed, without any previous request to satisfy the mortgage.

1014. Mississippi.[3] — A mortgagee or *cestui que trust*, or his assignee or successor, having received full payment of the money due by the mortgage or deed of trust, shall, at the request of the mortgagor or grantor, enter satisfaction upon the margin of the record of such mortgage or deed of trust, in the clerk's office, which entry discharges the same and revests the title in the grantor.[4] The trustee in any deed of trust is empowered and required, upon satisfactory proof being made to him that his *cestui que trust* has received full payment of the money secured by such deed, to enter satisfaction in like manner. Discharge may also be made by a deed of release, or an attorney may be appointed to enter satisfaction upon the margin of the record. A neglect to enter, discharge, or make release for three months after request

[1] Acts, 1877, p. 9.

[2] Revision, 1866, p. 332; 1 Stat. at Large, 1873, p. 642; and see Laws, 1876, c. 38.

[3] Rev. Code, 1871, p. 501.

[4] Laws, 1876, p. 262.

and tender made of reasonable expenses, makes the person so neglecting or refusing liable to forfeit to the party aggrieved any sum not exceeding the mortgage money, to be recovered by action.[1]

1015. Missouri.[2] — A mortgagee, trustee, or *cestui que trust*, his executor, administrator, or assignee, upon receiving full satisfaction of any mortgage or deed of trust, shall, at the request and cost of the person making the same, acknowledge satisfaction on the margin of the record, or deliver to such person a sufficient deed of release of the mortgage or deed of trust. A trustee acknowledging satisfaction, or making a deed of release, must be joined by the *cestui que trust*. Neglect for thirty days after request and tender of cost renders the delinquent liable to forfeit to the person aggrieved ten per cent. of the amount of the mortgage or deed of trust, absolutely, and any other damages he may be able to prove he has sustained, to be recovered by action. Any attorney in fact to whom the money due has been paid has power to execute the release.[3] Such acknowledgment or release has the effect to discharge the mortgage or reinvest in the mortgagor or his legal representative the title to the property.

1016. Montana Territory.[4] — A mortgage may be discharged by an entry in the margin of the record, signed by the mortgagee, or his personal representative or assignee, acknowledging satisfaction of the mortgage in the presence of the recorder or his deputy, who must subscribe as a witness. Such entry has the same effect as a deed of release duly acknowledged and recorded. It may also be discharged upon the record by the recorder whenever there shall be presented to him a certificate executed by the mortgagee, his personal representative or assignee, acknowledged or proved, specifying that such mortgage has been paid or otherwise satisfied. The certificate is recorded at length, with a note of reference to the record of the mortgage. If the holder of the mortgage, having received payment, refuses or neglects for the space of seven days after request to execute and acknowledge a certificate of discharge, he is liable to the mortgagor, his heirs or

[1] Rev. Code, 1871, p. 501.

[2] Wagner's Stat. 1872, c. 99, §§ 14–18.

[3] Neither the authority of the attorney nor his acknowledgment of satisfaction need be under seal. Vallé *v.* Am. Iron Mountain Co. 27 Mo. 455.

[4] Codified Stat. 1872, p. 402.

assigns, in the sum of one hundred dollars, and also for all actual damages occasioned by such neglect or refusal.

1017. Nebraska.[1] — A mortgage may be discharged by an entry in the margin of the record signed by the mortgagee, or his personal representative or assignee, acknowledging satisfaction of the mortgage, in the presence of the county clerk or his deputy, who must subscribe as a witness. Such entry then has the same effect as a deed of release duly acknowledged and recorded. It may also be discharged upon the record by the county clerk, in whose custody it may be, whenever there shall be presented to him a certificate executed by the mortgagee, his personal representatives or assigns, duly acknowledged or proved, specifying that the mortgage has been paid or otherwise satisfied. Such certificate is recorded with a reference to the record of the mortgage. In case of a neglect or refusal for the space of seven days after request and tender of reasonable charges to make such discharge, the person whose duty it is to make such discharge is liable to the mortgagor, his heirs or assigns, in the sum of one hundred dollars, in addition to all actual damages occasioned by such neglect or refusal, to be recovered by action.

1018. Nevada.[2] — A mortgage may be discharged by an entry on the margin of the record, signed by the mortgagee, or his personal representative or assignee, acknowledging satisfaction, in the presence of the recorder or his deputy, who must subscribe as a witness, and such entry has the same effect as a deed of release. It may also be discharged upon the record by the recorder on presentation of a certificate of payment duly acknowledged and certified. Such certificate is recorded at length with proper references. A neglect or refusal for seven days after request and a tender of reasonable charges to execute a release renders the person whose duty it is to do this liable to the mortgagor, his heirs or assigns, in the sum of one hundred dollars, and also for all actual damages occasioned by such neglect or refusal.

1019. New Hampshire.[3] — Upon the performance of the condition of the mortgage or upon the tender of such performance, the mortgage is void. If, after such performance or tender, the mortgagee, upon being requested, and having his reasonable charges tendered to him, refuses or neglects to execute a release

[1] G. S. 1873, c. 61, §§ 26–29.

[2] 1 Compiled Laws, 1873, §§ 263–266.

[3] G. S. 1867, c. 122, §§ 4, 5, 6; G. L. 1878, c. 136, §§ 4–7.

of his interest in the mortgaged premises, the mortgagor or person having his estate may apply by petition to the supreme court in the county where the premises lie, for a decree of discharge. If the court finds that the condition has been performed or tendered, a decree is entered that the mortgage be discharged. A copy of the decree is then recorded, and has the same effect as a release duly executed.

1020. **New Jersey.**[1] — When a mortgage is paid it is the duty of the clerk of the court of common pleas of the county in which the mortgage is recorded, on application to him by the mortgagor or person redeeming or paying the mortgage, and producing to him the mortgage cancelled, or a receipt upon it signed by the mortgagee, his representatives or assigns, to enter in a margin, to be left for that purpose opposite to the abstract or record, a minute of the redemption or payment; which minute is a full and absolute bar to and discharge of the entry and mortgage.

1021. **New Mexico Territory.** — There are no statutory provisions relating to the discharge of mortgages; therefore a deed of release should be used.

1022. **New York.**[2] —Any mortgage that has been recorded may be discharged upon the record by the officer in whose custody it may be whenever there shall be presented to him a certificate signed by the mortgagee, his personal representatives, or assigns, duly acknowledged or proved, specifying that the mortgage has been paid, or otherwise satisfied and discharged. Such certificate is recorded at length, and a reference made to the book and page of such record in the minute of the discharge of the mortgage made upon the record of that. When, from lapse of time, a mortgage may be presumed to have been paid, any person interested in the lands may petition the court for a discharge of it; and upon hearing and proof the court may order the mortgage discharged of record.[3]

[1] Nixon's Dig. 1868, p. 611; Rev. 1877, p. 706.

[2] 2 R. S. 1875, p. 1149; 1 Fay's Dig. of Laws, 1874, pp. 584, 592.

[3] The object of this latter provision is to remove an existing incumbrance when it has been paid in fact and not by mere presumption of law. The petition must allege that the mortgage is paid. It must also allege that the mortgagee has been dead for more than five years, and that letters testamentary or of administration have not been granted. Although the statute relates to mortgages presumed from lapse of time to have been paid, yet payment must be alleged and proved. If

1023. North Carolina.[1] — A deed of trust or mortgage may be discharged by an acknowledgment of satisfaction of the trust or mortgage in the presence of the register of deeds, whose duty it is forthwith to make upon the margin of the record an entry of such acknowledgment, which entry, being signed by the person discharging it and witnessed by the register, has the same effect to release and discharge all interest of the trustee, mortgagor, or representative in such deed or mortgage, as if a deed of release or reconveyance thereof had been duly executed and recorded.

1024. Ohio.[2] — Upon the payment of the mortgage debt the mortgagee must enter satisfaction on the margin of the record, or upon the mortgage itself, which entry made upon the mortgage the recorder of deeds for the county enters upon the margin of the record. Such entry made in either way has the effect of a release. These provisions for the entry of satisfaction do not preclude a release made in any other customary manner. When satisfaction is made by application of the proceeds of a judicial sale, or when the lien is declared invalid by judgment or decree, it is the duty of the clerk to enter a memorandum of the proceeding upon the record of the mortgage, and the court may order the entry of such memorandum.[3]

1025. Oregon.[4] — A mortgage may be discharged by an entry in the margin of the record, signed by the mortgagee, or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the county clerk or his deputy, who must subscribe the same as a witness; and such entry has the same effect as a deed of release duly acknowledged and recorded.

A mortgage may also be discharged upon the record by the county clerk in whose custody it may be whenever there shall be presented to him a certificate executed by the mortgagee, his personal representative or assignee, duly acknowledged, or proved and certified, specifying that the mortgage has been paid, or otherwise satisfied or discharged. This certificate must be recorded with a reference to the record of the mortgage. A neglect or

the evidence shows no payment except by presumption of law, no remedy can be had by this summary proceeding. Re Townsend, 4 Hun, 31; S. C. 6 Thomp. & C. 227.

[1] Battle's Revisal, 1873, c. 35, § 29.
[2] Rev. Stat. 1868 (S. & C.), p. 471.
[3] Act, 1872, p. 74.
[4] Gen. Laws, 1872, p. 519.

refusal of the mortgagee, or his personal representative or assignee, for the space of ten days after request and tender of his reasonable charges, to execute a discharge, renders him liable in the sum of one hundred dollars damages, and also for all actual damages occasioned by such neglect or refusal, to be recovered in an action at law.

1026. Pennsylvania.[1] — A mortgagee upon securing satisfaction of the mortgage is required, at the request of the mortgagor, to enter satisfaction upon the margin of the record, which entry operates as a full release and discharge of the mortgage. If he does not by himself or his attorney, within three months after such request and a tender of his reasonable charges, repair to the office for recording deeds and there make such acknowledgment, he shall forfeit and pay to the party aggrieved any sum not exceeding the mortgage money, to be recovered by suit. When a mortgage is payable by instalments, the receipt of each instalment must upon request be entered upon the record, under a like penalty for a refusal or neglect so to do. The amount claimed to be due upon a mortgage may be paid into court, whereupon a decree is made that satisfaction be entered upon the mortgage or that the property be reconveyed, and the court may afterwards proceed to hear and determine the objections to the payment of any part of the money in court, and may decree accordingly.

1027. Rhode Island.[2] — The holder of a mortgage, upon receiving full satisfaction for the money due upon it, must at the request of the mortgagor, his heirs, executors, administrators, or assignee, and at his or their cost, discharge the same by release under his hand and seal, upon the mortgage, or upon the face or margin of the record, or by separate instrument, to be recorded on the face or margin of the record, or in the record book, with suitable references to the original record. His neglect or refusal for ten days after a request and tender of all reasonable charges to discharge the mortgage in one of these modes, or to execute a release and quitclaim of the mortgaged estate, renders him liable to make good all damages that may accrue for want of such discharge, to be recovered in an action of the case in a court of record with treble costs.

1028. South Carolina.[3] — Every person who has received full

[1] Brightly's Purdon's Dig. 1872, p. 481.
[2] Gen. Stat. 1872, p. 356.
[3] Rev. Stat. 1873, pp. 427, 428.

payment or satisfaction of a mortgage, or to whom a legal tender shall have been made of his or their debt, damages, costs, and charges, shall, at the request of the mortgagor or his legal representative, or of any other person being a creditor of such debtor, or a purchaser under him, or having an interest in any estate bound by such mortgage, and on tender of the fees of office for entering such satisfaction, within three months after such request made, enter satisfaction in the proper office on such mortgage, which forever discharges and satisfies it. If any person who has received such payment or satisfaction does not within that time, by himself or his attorney, after request and tender of fees of office, repair to such office and enter satisfaction, he shall for such refusal or neglect forfeit to the party aggrieved a sum of money not exceeding one half the amount of the debt secured by the mortgage, to be recovered by action. On the recovery of judgment by the plaintiff, it is the duty of the judge to order satisfaction of the mortgage to be entered by the proper officer.

1029. Tennessee. — There are no statutory provisions as to the release of mortgages and deeds of trust. A deed of release is used for this purpose.

1030. Texas. — Mortgages and deeds of trust are discharged by payment, and no record of discharge is necessary and none is provided for.

1031. Utah Territory. — No provision of statute in relation to the release of mortgages and trust deeds is found.

1032. Virginia. — Mortgages, in the technical sense of the term, are not in use, deeds of trust taking their place. These are discharged by a deed of release. Whenever a release of a trust deed or other obligation shall be admitted to record in the clerk's office of any county or corporation court, or of the Chancery Court of Richmond city, it shall be the duty of the clerk of such court to make a memorandum on the margin of the page of the book upon which such trust deed or other obligation is recorded, stating that such trust deed or other obligation is released, and referring to the page and number, and number of the deed book, upon which such release is recorded.[1]

1033. Vermont.[2] — Mortgages may be discharged by an entry on the margin of the record, signed by the mortgagee or his attorney, executor, administrator, or assignee, acknowledging satis-

[1] Acts, 1876, p. 130, § 1.

[2] Gen. Stat. 1870, c. 65, §§ 29–31.

faction of the mortgage; and such entry has the same effect as a deed of release duly acknowledged and recorded. Mortgages may also be discharged by the mortgagee, or his attorney, executor, administrator, or assignee, acknowledging payment by an entry on the mortgage deed, signing the same and affixing his seal in the presence of one or more witnesses, which entry, upon being recorded on the margin of the record of such mortgage in the record of deeds, discharges the mortgage. If a mortgagee, or other person whose duty it is to discharge the mortgage, refuses or neglects for the space of ten days after request and a tender of his reasonable charges to discharge the mortgage as above provided, or to execute and acknowledge a deed of release, he is liable for all damages occasioned by such neglect or refusal, to be recovered in an action on the case; and a court of chancery may grant such further relief as justice may require.

1034. Washington Territory. — No provision for a discharge of mortgages is found. A common deed of release is used.

1035. West Virginia.[1] — Any person entitled to the benefit of a lien may release it by a writing signed by him and acknowledged and admitted to record in the proper county. It is sufficient if it describe the lien by any words that will identify and show an intent to discharge the same. The release is presented to the recorder, in whose office the lien is recorded; and from the time it is so left for record it is discharged and extinguished, and the estate is redeemed and vested in the former owner. The recorder makes note of the release on the margin of the record of the lien. In case of the refusal of the party holding such lien to execute a release upon request of the party entitled to it, the circuit court having jurisdiction, after reasonable notice to the party so refusing, and if no good cause be shown against it, may direct the recorder to execute such release, which has the effect of a release made by the party himself. The proceedings are at the cost of the party refusing to release.[2]

[1] Releases and their acknowledgment may be in form or effect as follows, in case of a mortgage or trust deed: —

"I, A—— B——, hereby release a mortgage (or deed of trust) made by C—— D—— to me (or to E—— F——, my trustee, or to ———, and assigned to me), dated the day of , and recorded in the recorder's office of county, West Virginia, in deed book , page . (To be signed) A—— B——. Acknowledged before the subscriber this day of . (To be signed) G—— H——, justice (or recorder, notary public, &c., as the case may be)."

[2] Code, 1870, c. 76.

1036. Wisconsin.[1] — A recorded mortgage may be discharged by an entry in the margin of the record, signed by the mortgagee, his personal representatives or assignee, acknowledging the satisfaction of the mortgage in the presence of the register or his deputy, who must subscribe the same as a witness; and such entry has the same effect as a deed of release. Any mortgage may also be discharged upon the record by the register of deeds whenever there shall be presented to him a certificate, executed by the mortgagee, his personal representatives or assigns, acknowledged or proved and properly certified to entitle it to be recorded, specifying that the mortgage has been paid or otherwise satisfied. This is recorded at length, with proper minutes of reference to the mortgage. A foreign executor or administrator, upon filing in the county court of the county an authenticated copy of his appointment, may execute a certificate of discharge of a mortgage to like effect as an executor or administrator appointed under the laws of the state may do. The neglect of any person whose duty it is, upon the payment of a mortgage, to execute a discharge, for the space of seven days after request and a tender of his reasonable charges, to discharge the mortgage in one of these modes, renders him liable in the sum of one hundred dollars damages, and also for the actual damages occasioned by such neglect or refusal, to be recovered by action.[2]

1037. Wyoming Territory.[3] — A mortgage may be discharged by an entry in the margin of the record, signed by the mortgagee, or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the register of deeds or his deputy, who shall subscribe the same as a witness, and such entry shall have the same effect as a deed of release duly acknowledged and recorded. A discharge may also be made upon the record by the register whenever there shall be presented to him a certificate, executed by the mortgagee, his personal representative or assign, duly acknowledged or proved so as to be entitled to be recorded, specifying that such mortgage has been paid or otherwise satisfied. This certificate is recorded at length. If a mortgagee or other holder of the mortgage, after a full performance of the condition, whether before or after the breach, for the

[1] R. S. 1878, c. 100, §§ 2247–2256.

[2] As to the sufficiency of a complaint to enforce such penalty, see Teetshorn *v.* Hull, 30 Wis. 162.

[3] Compiled Laws, 1876, c. 3, §§ 24–27.

space of seven days after request and tender of his reasonable charges, refuses or neglects to discharge it on the margin of the record, or to execute a certificate of discharge, he is liable to the mortgagor, his heirs or assigns, in the sum of one hundred dollars, and also for all actual damages occasioned by such neglect or refusal, to be recovered in a civil action.

CHAPTER XXII.

REDEMPTION OF A MORTGAGE.

I. Redemption a necessary incident of a mortgage, 1038–1046.
II. Circumstances affecting redemption, 1047–1051.
III. When redemption may be made, 1052–1054.
IV. Who may redeem, 1055–1069.
V. The sum payable to effect redemption, 1070–1088.
VI. Contribution to redeem, 1089–1092.
VII. Pleadings and practice on bills to redeem, 1093–1113.

1. *Redemption a Necessary Incident of a Mortgage.*

1038. Generally. — As already observed,[1] mortgages of land were at first estates upon condition, and the mortgagor not performing the condition upon the day stipulated lost his estate forever. The idea of redemption after breach of the condition is said to have been introduced into English jurisprudence from the Roman law, under which default in payment of the mortgage debt at the time stipulated did not work a forfeiture of the property, but the creditor thereupon had the authority to sell the property and reimburse himself out of the proceeds. Redemption is purely a creature of courts of equity. Adopting the principle of the civil law, that a mortgage is merely a security for the payment of a debt, they interposed to prevent the hardship and injustice which resulted at common law from the failure of the mortgagor to strictly comply with the conditions of the mortgage. Although the mortgagor had forfeited his estate at law, courts of equity allowed him to redeem his estate within a reasonable time, upon payment of the debt and all proper charges, and this right was called an equity of redemption.

1039. An express stipulation not to redeem does not bind the mortgagor. So fully recognized and protected are the equitable rights of the mortgagor, that he is relieved from his own express agreement that upon his failure to pay the mortgage debt at the time stipulated his estate shall be forfeited, such agree-

[1] §§ 6–11.

ment being held utterly void in equity.[1] He cannot, by any form of words, give the mortgage the conditional character it had in the time of Littleton, and which it still has in law; for jurisdiction of the subject will always be taken by a court of chancery, which, looking to the object of the transaction to give security for a debt, will always relieve the mortgagor from the consequences of his failure to perform the condition; and will protect him against his own covenants not to redeem, because his necessities as a debtor may have forced him into this inequitable agreement. It matters not how strongly the parties may express their agreement that there shall be no redemption; the intent being contrary to the rules of equity it cannot be carried into effect.[2]

The right of redemption is the creature of the law. It is not in terms expressed by the parties in the mortgage. But whatever be the form of the transaction, if intended as a security for money, it is a mortgage, and the right of redemption attaches to it. Although a deed contain a condition that it shall be absolute and without redemption if a certain sum be not paid by the grantor at a fixed time, and the condition is not punctually performed, there is a right of redemption.[3] "At law," says Lord Eldon,[4] "the mortgagee is under obligation to reconvey at that particular day; and yet this court says that, though the money is not paid at the time stipulated, if paid with interest at the time a reconveyance is demanded, there shall be a reconveyance, upon this ground: that the contract is in this court considered a mere loan of money secured by a pledge of the estate. But that is a doctrine upon which this court acts against what is the *primâ facie* import of the terms of the agreement itself, which does not import at law that once a mortgage always a mortgage; but equity says that; and the doctrine of this court as to redemption does give

[1] 2 White & Tudor's Lead. Cas. in Eq. 1042. In East India Co. *v.* Atkyns, Com. R. 349, it is said that if a man makes a mortgage and covenants not to bring a bill to redeem, nay, if he goes so far, as in Stisted's case, to take an oath that he will not redeem, yet he shall redeem. See 2 Story's Eq. Juris. § 1019, and cases cited; Willets *v.* Burgess, 34 Ill. 494; Preschbaker *v.* Feaman, 32 Ill. 475; Wyncoop *v.* Cowing, 21 Ill. 570; Cherry *v.* Bowen, 4 Sneed (Tenn.), 415; Baxter *v.* Child, 39 Me. 110; Henry *v.* Davis, 7 Johns. (N. Y.) Ch. 40; 2 Cow. 324; Holridge *v.* Gillespie, 2 Johns. (N. Y.) Ch. 30.

[2] Bayley *v.* Bailey, 5 Gray (Mass.), 510, per Chief Justice Shaw.

[3] See § 241; Rogan *v.* Walker, 1 Wis. 527; Knowlton *v.* Walker, 13 Wis. 264; Orton *v.* Knab, 3 Wis. 576; Plato *v.* Roe, 14 Wis. 453.

[4] In Seton *v.* Slade, 7 Ves. 265, 273; see, also, numerous cases cited in note *a*; Spurgeon *v.* Collier, 1 Eden, 55, 60.

countenance to that strong declaration of Lord Thurlow, that the agreement of the parties will not alter it; for I take it to be so in the case of a mortgage that you shall not, by special terms, alter what this court says are the special terms of that contract."

1040. The time of redemption may by the terms of the mortgage be postponed for a term of years, or even during the lifetime of the mortgagor or of any other person, and this arrangement is generally for the benefit and convenience of both parties; the mortgagor by this means securing the use of the loan for a fixed period, and the mortgagee obtaining at the same time a continuing security and income for his loan. If the mortgaged property is ultimately and within a reasonable period to be restored to the mortgagor, there is no objection to a mortgage which postpones the payment and redemption for a period of considerable length; and it will be enforced according to its terms. It is only in case of an irredeemable mortgage, or one which is such in effect, that courts of equity will disregard its terms, and annex to it a right of redemption as an indispensable requisite of every mortgage.

How long the right to redeem may be postponed must depend upon the circumstances of the case. It may be postponed so long by the terms of the mortgage as to become oppressive to the mortgagor, and thus give equitable ground for relief by an earlier redemption. In one case such relief was given more than twenty-five years after the date of the mortgage, though it had a still longer period to run, the estate having increased greatly in value, and the mortgagee having entered and retained possession of it from the beginning;[1] and in another case it was afforded against a mortgage made by the mortgagor to his solicitor, and in which there was a restraint upon redemption for twenty years, with twelve months' notice after that time.[2]

1041. An agreement to confine the right of redemption to the mortgagor alone, or to any specified persons or class of persons, is a restraint which may be only a little less than providing against any exercise at all of the right, and is relieved against upon the same ground.[3] It is not every such arrangement, how-

[1] Talbot *v.* Braddill, 1 Vern. 183, 394.

[2] Cowdry *v.* Day, 1 Gif. 316.

[3] Howard *v.* Harris, 1 Vern. 33; Newcomb *v.* Bonham, 1 Vern. 8; Freem. Ch. 67; Spurgeon *v.* Collier, 1 Eden, 55. In Newcomb *v.* Bonham, the Lord Chancellor said it was a general rule, *once*

ever, that is open to objection. Where the mortgagor limited redemption to his own lifetime for the purpose of benefiting the mortgagee, a near relative, by way of settlement, and reserved to himself the right to redeem at any time during his own life, the mortgage was upheld.[1] In like manner a stipulation in the mortgage limiting the time within which redemption may be had does not affect the right to redeem.[2]

1042. Any arrangement which is merely an evasion of the equitable rule that every mortgage is redeemable, or which is designed to enable the mortgagee to wrest the property from the mortgagor, is open to the same objection;[3] as, for instance, an agreement not upon any event or condition to sue for redemption or for the discharge of the mortgage; or an arrangement by which the equity of redemption is conveyed absolutely to the mortgagee, but without intending an absolute sale of it.[4] The court always looks with disfavor and distrust upon any arrangement by which it is proposed to transfer the equity of redemption absolutely to the mortgagee.[5]

1043. An agreement that if the money be not paid by a certain day, the mortgagee shall have the estate absolutely upon the payment of a further sum, is open to the same objection,

a mortgage always a mortgage, and as the estate was expressly redeemable during the mortgagor's lifetime, it must continue so afterwards. The case of Howard *v.* Harris, 1 Vern. 33, was as follows: Howard mortgaged land, and the proviso for redemption was, provided that I myself, or the heirs male of my body, may redeem. (In note to the case it is said there was a covenant that no one else should redeem.) The question was, whether his assignee should redeem it, and it was decided he should.

[1] Bonham *v.* Newcomb, 1 Vern. 8; 2 Vent. 364.

[2] Stove *v.* Bounds, 1 Ohio St. 107.

[3] Vernon *v.* Bethell, 2 Eden, 110; E. I. Co. *v.* Atkyns, 1 Com. 349; Toomes *v.* Conset, 3 Atk. 261; and see Jennings *v.* Ward, 2 Vern. 520; Willett *v.* Winnell, 1 Vern. 488; and see, also, 3 Eq. Cas. Abr. 599.

[4] Vernon *v.* Bethell, *supra*. Lord Chancellor Northington said: "This court, as a court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them. The present case . . . . is not that; but . . . . it seems to be very much within the mischief which the rule intended to prevent, of making an undue use of the influence of a mortgagee."

[5] Sheckell *v.* Hopkins, 2 Md. Ch. 89.

and is redeemable notwithstanding.[1] Such an agreement is to be distinguished from one accompanying a transaction which is not a mortgage but an absolute sale, whereby the grantor is allowed to repurchase upon certain terms.[2] If the transaction was really a mortgage under the form of an absolute sale, any agreement respecting it which would be objectionable in case of a formal mortgage is equally objectionable here. But there may be a valid sale with an agreement for repurchase. "That this court," says Lord Cottenham,[3] "will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, if it appears that the parties intended it to be a mortgage, is no doubt true; but it is equally clear that if the parties intended an absolute sale, a contemporaneous agreement for a purchase, not acted upon, will not of itself entitle the vendors to redeem."

1044. Neither is the mortgagee allowed to obtain a collateral advantage under the color of a mortgage, which does not strictly belong to the contract. Of this character is a stipulation that if interest is not paid at the end of the year it shall be converted into principal;[4] an agreement for the payment of a commission upon the amount advanced,[5] or upon the rents collected by the mortgagee,[6] or for management while in possession,[7] or as auctioneer for a sale.[8] "A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement."[9]

1045. An agreement in the mortgage itself, or executed separately but contemporaneously with the mortgage, that upon default the mortgagor shall forthwith release the equity of redemption, under the rule already stated, is void, and redemption will be allowed notwithstanding.[10] An agreement executed subsequently to the mortgage, by which the forfeiture is to be absolute if the debt is not paid at the day stated, may be void as

[1] Price *v.* Perrie, Freem. Ch. 257; Brown *v.* Edwards, 1 Ch. R. 222; see Re Edwards' Est. 11 Ir. Ch. 367.

[2] §§ 256–279.

[3] In Williams *v.* Owen, 5 M. & Cr. 303; and see, also, Ward *v.* Wolverhampton Water Works Co. L. R. 13 Eq. 243; Davis *v.* Thomas, 1 Russ. & My. 506.

[4] § 650; Chambers *v.* Goldwin, 9 Ves. 271.

[5] Chapple *v.* Mahon, I. R. 5 Eq. 225.

[6] Leith *v.* Irvine, 1 My. & K. 277.

[7] Comyns *v.* Comyns, I. R. 5 Eq. 583.

[8] Broad *v.* Selfe, 11 W. R. (M. R.) 1036; 9 Jur. N. S. 885; Barrett *v.* Hartley, 2 L. R. Eq. 795.

[9] Per Master of the Rolls in Jennings *v.* Ward, 2 Vern. 520.

[10] Clark *v.* Henry, 2 Cow. (N. Y.) 324.

well.[1] It has sometimes been said that such a contract will not be positively disregarded in a court of equity, though it will be viewed suspiciously and watched narrowly.[2]

1046. Redemption after release improperly obtained. — Redemption may be had after a release of the equity of redemption to the mortgagee, when it appears that he availed himself of his possession of the property and of the embarrassed condition and physical debility of the mortgagor to obtain the release.[3] Or if it appears that the mortgagor, induced by threats, conveyed the equity of redemption to the mortgagee for a grossly inadequate price.[4] The intention of the parties that the conveyance by the mortgagor should have the effect of barring his equity of redemption should clearly appear.[5] If, however, the release of the equity of redemption was made in good faith without undue influence, for a valuable consideration, it will be sustained.[6] A release having been made for a substantial consideration, parol evidence is not admissible to show that the sole purpose of the release was to enable the releasee to give a perfect title to such portions of the lands as he might be able to sell, applying the proceeds to the credit of the releasor, and that the equity of redemption in the portions not so sold should remain unaffected by the release.[7]

2. *Circumstances affecting Redemption.*

1047. The right of redemption is barred by a foreclosure properly made.[8] Though the mortgagee holds two mortgages upon the premises, the foreclosure of one of them extinguishes the mortgagor's equitable interest.[9] But the right of redemption

[1] Tennery *v.* Nicholson, 87 Ill. 464; Batty *v.* Snook, 5 Mich. 231. Per Manning, J.: "To allow the equity of redemption to be cut off by a forfeiture of it in a separate contract would be a revival of the common law doctrine, using for that purpose two instruments, instead of one, to effect the object."

[2] Hyndman *v.* Hyndman, 19 Vt. 9.

[3] Thompson *v.* Lee, 31 Ala. 292; and see Russell *v.* Southard, 12 How. 139.

[4] Brown *v.* Gaffney, 28 Ill. 149.

[5] Ennor *v.* Thompson, 46 Ill. 214.

[6] Falis *v.* Conway Ins. Co. 7 Allen (Mass.), 46; Trull *v.* Skinner, 17 Pick. (Mass.) 213; Vennum *v.* Babcock, 13 Iowa, 194; Green *v.* Butler, 26 Cal. 595; Pritchard *v.* Elton, 38 Conn. 434; Wynkoop *v.* Cowing, 21 Ill. 570; Marshall *v.* Stewart, 17 Ohio, 356; Holridge *v.* Gillespie, 2 Johns. (N. Y.) Ch. 30; Remsen *v.* Hay, 2 Edw. (N. Y.) 535; Odell *v.* Montross, 6 Hun (N. Y.), 155; 68 N. Y. 499.

[7] Sweet *v.* Mitchell, 15 Wis. 641.

[8] Weiner *v.* Heintz, 17 Ill. 259; Willis *v.* M'Intosh, Ga. Dec. 162; Stoddard *v.* Forbes, 13 Iowa, 296; Ballinger *v.* Bourland, 87 Ill. 513.

[9] Weiss *v.* Alling, 34 Conn. 60.

belonging to every person claiming under the mortgagor, and being an incident to every interest in the land mortgaged, the right cannot be extinguished without due process of law, which shall afford every one having such interest an opportunity of exercising his right to redeem; and consequently the foreclosure bars the rights of redemption of those only who are made parties to the action. As to those having this right, who are not made parties, the proceeding is a nullity.[1]

A purchaser at a sale under a foreclosure suit in equity, to which a junior mortgagee was by oversight not made a party, may maintain a suit against such mortgagee to compel him to redeem within a reasonable time or to be foreclosed. In a recent case in New Jersey it was decreed that if such junior incumbrancer should elect to redeem, he should pay not only the principal and interest of the mortgage foreclosed, but also the amount paid by the purchaser upon any lien prior to such junior mortgage; and that the junior mortgagee should, upon election to redeem, give notice to that effect within thirty days, whereupon a decree should be entered that an account be stated by a master; but if he should fail or neglect to give such notice of his election within the time prescribed, a decree of strict foreclosure should be entered.[2]

1048. Redemption may be had after foreclosure when the person entitled to it was not made a party to the suit.[3] This rule has been extended to give the purchaser of the equity from the mortgagor the right to redeem, because not made a party to the suit, even though his deed was not on record at the time of the decree of foreclosure.[4] A purchaser of a part of the mortgaged premises has a right to redeem under like circumstances,[5] and an attaching creditor has the same right.[6]

A wife who owns a part of the mortgaged premises, but was not made a party to the foreclosure suit, is allowed to redeem,

[1] Miner *v.* Beekman, 50 N. Y. 337; 14 Abb. Pr. N. S. 1; 42 How. Pr. 33; Murdock, *v.* Ford, 17 Ind. 52; Bates *v.* Ruddick, 2 Iowa, 423; Johnson *v.* Harmon, 19 Iowa, 56.

[2] Parker *v.* Child, 25 N. J. Eq. 41.

[3] Farwell *v.* Murphy, 2 Wis. 533; Murphy *v.* Farwell, 9 Wis. 102; Pratt *v.* Frear, 13 Wis. 462; Wiley *v.* Ewing, 47 Ala. 418; Hodgen *v.* Guttery, 58 Ill. 431; Gower *v.* Winchester, 33 Iowa, 303; Smith *v.* Sinclair, 10 Ill. 108; Strang *v.* Allen, 44 Ill. 428.

[4] Hodson *v.* Treat, 7 Wis. 263.

[5] Green *v.* Dixon, 9 Wis. 532.

[6] Chandler *v.* Dyer, 37 Vt. 345.

although her husband was made a party to the suit, and was foreclosed of all his rights in the remainder of the land.[1]

Not only the purchaser at the foreclosure sale with notice that one interested in the estate was not made a party to the foreclosure suit, but also any grantee of such purchaser, with like notice, takes the title subject to the right of such person to redeem.[2]

A first mortgagee brought a foreclosure suit to which he did not make a second mortgagee a party. Pending this suit the second mortgagee brought a foreclosure suit without making the first mortgagee a party to it. Each suit proceeded to judgment and sale in this order. It was held that the purchaser under the first decree and sale took the entire fee, subject only to the second mortgage, the payment of which having been tendered, the purchaser at the foreclosure sale under that mortgage was not allowed to redeem.[3] But a prior mortgagee has no right to redeem a subsequent mortgage although he has barred all other interests in the equity of redemption by foreclosure.[4]

One who has obtained an interest in the property pending a foreclosure suit is not generally permitted to redeem.[5]

On a bill to redeem from an irregular and invalid foreclosure, the decree should provide for redemption from an unforeclosed security, and not from a void sale; and in determining the amount to be paid, it is erroneous to make a rest in computing interest at the date of the sale.[6]

1049. Mortgagor may be estopped by his own acts. — If the owner of an equity of redemption encourages a person to purchase the mortgage by promising that he would never redeem, a court of equity will not allow him to violate his engagements and redeem from such purchaser who has made expensive improvemants on the land;[7] nor will he be allowed to redeem after having joined the mortgagee in selling the premises at public auction under an engagement to give a title of warranty, and he has received the purchase money from one who purchased in good faith, and made large improvements.[8]

1050. The owner of the equity of redemption may main-

[1] Green *v.* Dixon, 9 Wis. 532.
[2] Hoppin *v.* Doty, 22 Wis. 621; Hodson *v.* Treat, 7 Wis. 263.
[3] Murphy *v.* Farwell, 9 Wis. 102.
[4] Goodman *v.* White, 26 Conn. 317.
[5] Cook *v.* Mancius, 5 Johns. (N. Y.) Ch. 89.
[6] Grover *v.* Fox, 36 Mich. 461.
[7] Fay *v.* Valentine, 12 Pick. (Mass.) 40.
[8] Wright *v.* Whithead, 14 Vt. 268.

tain a bill to redeem one only of two mortgages held by the same person as assignee; and the fact that the other mortgage has apparently been fully foreclosed will not prevent a decree in favor of the owner as to the mortgage he seeks to redeem.[1]

A purchaser at an execution sale of the mortgagor's right in equity having redeemed the mortgage, the mortgagor may redeem from the execution sale within the year allowed for this, by paying the amount required for the redemption of that interest alone, and may afterwards redeem from the mortgage within the time in which he might have redeemed the estate of the mortgagee had no sale been made.[2]

1051. In several states a period is allowed after a foreclosure sale for redemption. A brief statement of the fact, whether redemption is allowed or not, and of the time allowed after sale, is given in a note below;[3] but a fuller statement of the law in this respect is given in the chapter in which the statutory provisions of the several states in relation to foreclosure and redemption are stated.[4]

This is a right of redemption as distinguished from an equity of redemption.[5]

As already noticed, the law existing at the time of the execution of a mortgage is that which governs as to its validity.[6] It is equally true that the law existing at the time of the making of

[1] Milliken *v.* Bailey, 61 Me. 316.

[2] Atkins *v.* Sawyer, 1 Pick. (Mass.) 354.

[3] **Alabama**: For two years after sale. **Arkansas**: None. **California**: For six months by owner. **Colorado**: For six months by owner. **Connecticut**: Strict foreclosure: time limited by court. **Delaware**: None. **Florida**: None. **Georgia**: None. **Illinois**: For twelve months by owner. **Indiana**: For one year after sale. **Iowa**: For one year after sale. **Kansas**: None. **Kentucky**: None. **Louisiana**: None. **Maine**: None after sale, but three years after possession taken for foreclosure or first advertisement. **Massachusetts**: None after sale, but three years after possession taken for foreclosure. **Maryland**: None. **Michigan**: None, but no sale can be made within one year after filing the bill to foreclose. **Minnesota**: One year after sale. **Mississippi**: None. **Missouri**: None. **Nebraska**: None. **Nevada**: Six months after sale. **New Hampshire**: One year after entry to foreclose. **New Jersey**: None. **New York**: None. **North Carolina**: None. **Ohio**: None. **Oregon**: Sixty days after sale. **Pennsylvania**: None; but suit by *scire facias* to foreclose cannot be commenced until the lapse of one year after default. **Rhode Island**: None after sale; but three years after possession taken and continued either by peaceable entry or by action. **South Carolina**: None. **Tennessee**: Two years after sale. **Texas**, None. **Vermont**: Time limited by the court, not exceeding one year from judgment. **Virginia**: None. **West Virginia**: None. **Wisconsin**: None.

[4] See chapter xxx.

[5] Mayer *v.* Farmers' Bank, 44 Iowa, 212.

[6] § 663.

the mortgage governs in respect to redemption and foreclosure after a foreclosure sale. If, upon petition of a second mortgagee, the whole estate be sold to discharge the mortgages in the order of their priority, and there was no right of redemption when the first mortgage was given, a third mortgagee cannot redeem, though he might have done so had the second mortgagee merely foreclosed his own mortgage. The third mortgagee cannot complain because he is chargeable with notice of the contents of the petition.[1] A statute giving a right of redemption for two years after sale is unconstitutional and void, as applied to mortgages executed prior to the enactment of the statute, as impairing the obligation of the contract.[2] In like manner a law shortening the time of redemption from two years to one year after sale is unconstitutional in respect to mortgages existing at the time it took effect. A redemption must be allowed upon such mortgages for two years, in accordance with the law existing when they were executed.[3]

A mistake by the officer who made the sale, in certifying the time of redemption to be one year instead of two, as allowed by law, does not avoid the foreclosure; but in order to redeem a tender should be made within the two years.[4]

When the holder of the certificate of purchase, after the expiration of the time for redemption, allows the grantee of the equity of redemption to redeem, and indorses and delivers the certificate to him, this is a redemption, and the certificate becomes null and void. It does not amount to a transfer of the certificate, or enable the holder of it to use it as a basis of title.[5] A purchaser of the premises at a sheriff's sale under execution stands in the place of the mortgagor as regards the time within which he may redeem from a subsequent foreclosure sale, and cannot redeem after the time within which the latter may redeem has expired, and during the time beyond that allowed to judgment creditors of the mortgagor for redemption.[6] The right of a second mortgagee to redeem cannot be prejudiced by an extension of the statutory

[1] Gargan *v.* Grimes, 47 Iowa, 180. See Mayer *v.* Farmers' Bank, 44 Iowa, 212.

[2] Howard *v.* Bugbee, 24 How. 461; Bugbee *v.* Howard, 32 Ala. 713; Goenen *v.* Schroeder, 8 Minn. 387; Heyward *v.* Judd, 4 Ib. 483; Carroll *v.* Rossiter, 10 Ib. 174.

[3] Cargill *v.* Power, 1 Mich. 369.

[4] Johnstone *v.* Scott, 11 Mich. 232.

[5] Frederick *v.* Ewing, 82 Ill. 363. See McRoberts *v.* Conover, 71 Ill. 524; Brooks *v.* Keister, 45 Iowa, 303.

[6] McRoberts *v.* Conover, *supra*.

time of redemption by arrangement between the first mortgagee and the mortgagor.[1] A right of redemption after foreclosure, given by statute in any state, becomes a rule of property binding upon the courts of the United States sitting in such states; and the rules of practice of such courts must be made to conform to the law of the state so far as may be necessary to give full effect to the right.[2] But although a decree of a court of the United States sitting in Illinois for a foreclosure sale without providing for a redemption, according to the statute of that state, is erroneous, yet it is not void; and a mortgagor entitled to redeem must exercise his right within a year, or his right will be lost.[3] The defect in such a decree is merely in its failing to provide for a right to redeem. The court having jurisdiction of the cause, its decree is not void, and it cannot be questioned collaterally. The right of redemption exists by force of the statute. The deed was prematurely executed and delivered to the purchaser, but the right to redeem was not thereby impaired. As affecting the sale itself, it would seem that a sale without redemption would insure a better price than a sale with a right to redeem; so that the mortgagor has nothing to complain of in that respect. Had all been in regular form, and a certificate of purchase only given on the sale, the purchaser would, after the lapse of the statutory period, be entitled to a deed, there having been no effort for the exercise of the right of redemption. Now, after the lapse of that time the purchaser having the deed, although it was prematurely executed, the purchaser may hold it, there being no equitable ground for the interposition of a court of equity to set the sale aside.

3. *When Redemption may be made.*

1052. There can be no redemption till the mortgage is due. A mortgage payable at a fixed time cannot be redeemed until that time has arrived;[4] and even if the mortgagor tenders the interest for the whole period the mortgage has to run, a suit to redeem cannot be maintained against the objection of the mort-

[1] Sager *v.* Tupper, 35 Mich. 134.

[2] Brine *v.* Insurance Co. 96 U. S. 627; 6 Reporter, 33; 7 Am. L. Rec. 85; 2 South. L. J. 185; Orvis *v.* Powell (U. S. Supreme Ct. Oct. T. 1878), 8 Cent. L. J. 74.

[3] Suitterlin *v.* Conn. Mut. Life Ins. Co. (Ill. Supreme Ct. Feb. 1879) 11 Chicago L. N. 193.

[4] Brown *v.* Cole, 14 Sim. 427; 14 L. J. N. S. Ch. 167; Burrowes *v.* Molloy, 2 Jo. & Lat. 521; Abbe *v.* Goodwin, 7 Conn. 377. See Moore *v.* Cord, 14 Wis. 213.

gagee until the mortgage is due by its terms. The courts cannot substitute another contract for that made by the parties.[1] A mortgage payable on demand, or at or before a day certain, may be redeemed at any time.[2]

The right of redemption continues until barred by lapse of time, by strict foreclosure, or by deed given in completion of a foreclosure sale.[3] It is not barred by any proceeding at law other than a foreclosure suit, as, for instance, a judgment for waste against the owner of the equity for cutting trees on the mortgaged land.[4] There is no remedy for obtaining redemption other than a bill in equity.[5] Even in case the mortgage debt has been wholly paid, if the mortgagee claims that something is still due, a bill in equity is the proper remedy.[6] In such a suit he may demand that the mortgage be discharged, but must offer to pay any sum that may be adjudged to be still due.[7] So long as the mortgage remains in force and unsatisfied at law, the mortgagor cannot maintain ejectment against the mortgagee.[8] The mortgagee cannot be compelled to take the mortgaged property at an appraised value.[9] He cannot be compelled to take anything but money in payment, and that only by a bill in equity properly framed for the purpose.[10]

As a general rule when a suit to redeem by the mortgagor would be barred by the statute of limitations, a suit by any one claiming under him would be barred also.[11]

Redemption is not barred under a decree of foreclosure and sale, until the sale is consummated by the confirmation of the master's report and the delivery of the deed.[12]

1053. The time of redemption may by agreement of the parties be extended beyond the period at which it would otherwise be barred by foreclosure; as by an agreement to allow six months to redeem after the regular time for redemption would

[1] Abbe *v.* Goodwin, 7 Conn. 377.

[2] John & Cherry Street, in re, 19 Wend. (N. Y.) 659.

[3] Hull *v.* McCall, 13 Iowa, 467; Weiner *v.* Heintz, 17 Ill. 259; Heimberger *v.* Boyd, 18 Ind. 420.

[4] Paulling *v.* Barron, 32 Ala. 9.

[5] Pearce *v.* Savage, 45 Me. 90; Douglass *v.* Woodworth, 51 Barb. (N. Y.) 79.

[6] Pratt *v.* Skolfield, 45 Me. 386.

[7] Beach *v.* Cooke, 28 N. Y. 508; Hill *v.* Payson, 3 Mass. 559; Parsons *v.* Welles, 17 Mass. 419.

[8] Pell *v.* Ulmar, 18 N. Y. 139; Chase *v.* Peck, 21 N. Y. 581.

[9] Craft *v.* Bullard, 1 Sm. & M. (Miss.) Ch. 366.

[10] Craft *v.* Bullard, *supra.*

[11] Tucker *v.* White, 2 Dev. & B. (N. C.) Eq. 289.

[12] Brown *v.* Frost, 1 Hoffm. (N. Y.) 41.

expire.[1] If the promise be to reconvey or to allow the premises to be redeemed within a reasonable time, the mortgagor must be ready to tender his money within a reasonable time or he will be allowed no relief.[2] Such a promise made after the time limited for redemption has passed will have no effect unless made on a legal and sufficient consideration.[3] But an agreement made before the time of redemption has expired to allow further time, though made without consideration, cannot be disregarded after the time of redemption has passed, but will be enforced by the court.[4] There is nothing in the relation of the parties to prevent their freely contracting with each other, or to prevent the mortgagee or the purchaser at a foreclosure sale from imposing his own terms as a condition of extending the time for redeeming.[5] If the arrangement is such that the foreclosure is opened, as would usually be the case, then the failure of the mortgagor to pay the debt or to perform his agreement, whatever it may be, strictly within the extended time agreed upon, does not work an absolute forfeiture of his right, but he may still redeem within a reasonable time.[6]

Where a time of redemption is allowed by statute after a sale under a power, payments made after the foreclosure, and received with the clear understanding that the redemption should be completed by payment of the whole sum necessary for that purpose within the year allowed by the statute, are in affirmance and not in avoidance of the sale, and their acceptance does not operate to open the sale and extend the time of redemption.[7] Moreover, a court of equity has no power to extend the time for redemption on a statutory foreclosure, although redemption within the time allowed for it by statute has been prevented by accident and misfortune, or by unavoidable mental and physical disorder.[8]

1054. Advantage of an irregular foreclosure must be taken within a reasonable time. After a lapse of sixteen years, dur-

1 Chase *v.* McLellan, 49 Me. 375.
2 McNew *v.* Booth, 42 Mo. 189.
3 Smalley *v.* Hickok, 12 Vt. 153.
4 Davis *v.* Dresback, 81 Ill. 393.
5 Ross *v.* Sutherland, 81 Ill. 275.
6 Dodge *v.* Brewer, 31 Mich. 227.
7 Cameron *v.* Adams, 31 Mich. 426.
8 Cameron *v.* Adams, *supra*. Mr. Justice Campbell said: "Where a valid legislative act has determined the conditions on which rights shall vest or be forfeited, and there has been no fraud in conducting the legal measures, no court can interpose conditions or qualifications in violation of the statute. The parties have a right to stand upon the terms of the law."

ing which time the mortgagor has had knowledge of the facts, he will not be allowed to redeem.[1]

Where a mortgagee just previous to the completion of a foreclosure by possession promised the mortgagor that "he would give him some time, but that he must not wait long, as he might take advantage of the mortgage," after the lapse of five years without payment or tender, the right of redemption was held to be no longer remaining.[2] If a mortgagor wishes to take advantage of an irregularity in a foreclosure sale made in a suit in equity, to which he was a party, his remedy is by application to have the sale set aside and a new sale granted: he has no power to redeem, although the mortgagee was the purchaser at the sale.[3]

The mortgagor's right to redeem is unaffected by an entry to foreclose made by the heirs of the mortgagee and possession thereunder for more than three years; and the mortgagor may, on a bill in equity against them and an administrator of the mortgagee's estate, redeem the land from the mortgage, and compel the heirs at law to account for the rents and profits to the administrator, to be applied by him on the mortgage debt.[4]

4. *Who may redeem.*

1055. In general any party in interest may redeem. To sustain a bill to redeem, the plaintiff must have either the mortgagor's title or some subsisting interest under it.[5] It is not necessary that he should be interested in the whole of the mortgaged premises; if he owns the equity of redemption of a portion of them only, he may redeem the entire premises.[6] Neither is it necessary to entitle one to redeem that he should have an interest in fee in the premises; the right may be exercised by a tenant for years.[7] In general any one who has an interest in the land, and would be a loser by a foreclosure, is entitled to redeem.[8] His interest must be derived directly or indirectly from or through the

[1] Bergen *v.* Bennett, 1 Caines (N. Y.) Cas. 1; Mulvey *v.* Gibbons, 87 Ill. 367.

[2] Danforth *v.* Roberts, 20 Me. 307.

[3] Brown *v.* Frost, 10 Paige (N. Y.), 243, reversing S. C. Hoff. Ch. 41.

[4] Haskins *v.* Hawkes, 108 Mass. 379.

[5] Lomax *v.* Bird, 1 Vern. 182; Grant *v.* Duane, 9 Johns. (N. Y.) 591; Boarman *v.* Catlett, 13 Sm. & M. (Miss.) 149.

[6] Boqut *v.* Coburn, 27 Barb. (N. Y.) 230; Ex parte Willard, 5 Wend. (N. Y.) 94.

[7] Averill *v.* Taylor, 8 N. Y. 44.

[8] Pearce *v.* Morris, L. R. 5 Ch. App. 229; Boqut *v.* Coburn, *supra;* Scott *v.* Henry, 13 Ark. 112; Platt *v.* Squire, 12 Met. (Mass.) 494; Farnum *v.* Metcalf, 8 Cush. (Mass.) 46.

right of the mortgagor, so that he is in privity of title with the mortgagor, and an owner of a part of his original equity, or of some interest in it. If he is affected by the mortgage he may redeem; if he is not affected by it there is no occasion for his redeeming, and he is not allowed to do so.[1]

The performance of a contract to pasture cattle was secured by a mortgage given to the owner of the cattle by the owner of the rancho where they were pastured. A creditor of the mortgagee levied upon the cattle, and purchased them at the sale under the execution, but there was no seizure or sale of the contract to pasture; therefore it was held that he had no right to redeem the rancho from a prior mortgage.[2]

1056. A mortgagor who has conveyed the equity of redemption by a warranty deed to a third person cannot maintain a bill to redeem;[3] nor can a mortgagor whose right in equity has been sold on execution redeem the land, unless he has first redeemed it from the execution sale within the time allowed, even though the purchaser of the equity does not redeem;[4] but if the purchaser redeems the mortgage within the time allowed the judgment debtor to redeem from the execution sale, the latter may then within that time redeem from the execution sale, by paying the amount which may have been satisfied upon the execution by the sale, and may afterwards, at any time before the right to redeem the mortgage is barred by lapse of time, redeem from the mortgage in the same way that he might have redeemed from the original mortgagee had there been no sale on execution.[5] A sale of the equity of redemption upon an execution obtained by the holder of the mortgage for the mortgage debt is void, and the mortgagor may redeem as if no such sale had been made.[6]

1057. A mortgagor whose equity of redemption has been foreclosed by a second mortgagee cannot redeem the first mortgage, because his title is then wholly extinguished and vested in the second mortgagee, who alone is entitled to redeem the first

[1] Moore *v.* Beasom, 44 N. H. 215; Brewer *v.* Hyndman, 18 N. H. 9; Smith *v.* Austin, 9 Mich. 465; Boarman *v.* Catlett, 21 Miss. 149; Purvis *v.* Brown, 4 Ired. (N. C.) Eq. 413.

[2] Abadie *v.* Lobero, 36 Cal. 390.

[3] Phillips *v.* Leavitt, 54 Me. 405; True *v.* Haley, 24 Me. 297.

[4] Ingersoll *v.* Sawyer, 2 Pick. (Mass.) 276. See Peabody *v.* Patten, Ib. 517; Bigelow *v.* Willson, 1 Ib. 485.

[5] Atkins *v.* Sawyer, 1 Pick. (Mass.) 354.

[6] Atkins *v.* Sawyer, *supra;* Washburn *v.* Goodwin, 17 Pick. (Mass.) 137.

mortgage.[1] But if the first mortgagee foreclose the mortgage without making the second mortgagee a party to the proceeding, the second mortgagee may redeem the first mortgage, and the mortgagor still having the right to redeem the second mortgage may, by so doing, acquire the right of the second mortgagee to redeem the first.[2]

1058. Where a mortgage is conditioned for the support of the mortgagee for life, a grantee of the mortgagor, in order to redeem, must allege and prove that the transfer to him was made with the consent of the mortgagee; though it need not appear that such consent was in writing.[3] The purchaser of an estate subject to such a mortgage is sometimes allowed to redeem on paying a compensation in money for the past neglect of the mortgagor, and an allowance in money for the future.[4]

1059. In general only the mortgagor and those who hold a legal title under him can redeem.[5] An equitable title does not give this right; and therefore one holding a bond for a conveyance of land by the mortgagor cannot maintain a bill to redeem.[6] He may be authorized, however, to use the name of the holder of the legal title to pursue the remedy in his name.

A trustee who holds the legal estate or some interest in it is the proper party to redeem; though the persons beneficially interested may redeem upon the refusal of the trustee to do so.[7]

One who has assigned a mortgage as security for his debt has a right to redeem it on paying the debt. If his assignee has foreclosed the mortgage and purchased the premises, he may still redeem.[8] But the mortgagee may insist that the assignee who holds the legal title to the property shall be made a party to the suit;[9] though the suit may be brought in the name of the assignee for the benefit of both.

1060. The grantor by an absolute deed which is merely security for a debt, and therefore a mortgage, has the same right to redeem as a mortgagor in a formal mortgage, so long as the

[1] Colwell *v.* Warner, 36 Conn. 224.

[2] Goodman *v.* White, 26 Conn. 317.

[3] See §§ **380–395**; Bryant *v.* Jackson, 59 Me. 165; Bryant *v.* Erskine, 55 Me. 153.

[4] See § **395**; Austin *v.* Austin, 9 Vt. 420.

[5] Lomax *v.* Bird, 1 Vern. 182; Grant *v.* Duane, 9 Johns. (N. Y.) 591.

[6] McDougald *v.* Capron, 7 Gray (Mass.), 278. The statute limits the power of the court to those having a legal right.

[7] Fray *v.* Drew, 11 Jur. N. S. 130.

[8] Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48; Hoyt *v.* Martense, 16 N. Y. 231, reversing S. C. 8 How. Pra. 196.

[9] Winterbottom *v.* Tayloe, 2 Drew. 279.

grantee retains the property;[1] and after he has sold it to a *bonâ fide* purchaser from whom redemption cannot be made, he is still liable to account to the grantor for the value of the land at the time it should have been restored to him.[2] Redemption may also be had against the assignee of the grantee, in case he had notice that the delivery of the defeasance was evaded by fraud or otherwise, or that the transaction was in fact a mortgage.[3]

If it appears that the absolute deed was really a sale, or that by agreement of parties, and upon an adequate consideration, what was really a mortgage at first was afterwards changed into a sale, no redemption will be permitted. Evidence of the acts and declarations of the parties is admissible to show the original intention and the subsequent agreement as well.[4] But by some courts it is held in such case that the plaintiff cannot be relieved on the mere proof of the grantee's declarations. There must be proof of fraud, ignorance, or mistake, or of facts inconsistent with the idea of an absolute purchase.[5] It has been shown elsewhere that the rule in the several states as to the admission of parol evidence to establish the relation of mortgagor and mortgagee, where the transaction is in the form of an absolute deed, is not uniform;[6] and there is the same want of uniformity as to the admission of parol evidence to show that this relation once established has been given up by a surrender of the right of redemption. In general it may be said that the same degree of evidence is required to establish the surrender of the right that is required in the same state to establish the existence of the right.

A conveyance by a debtor in trust to secure his debt is to be considered a mortgage, to which the right of redemption is incident.[7]

In case of a mortgage in the form of an absolute deed in a suit to redeem, the court will decree a reconveyance of the property upon the payment of the debt.[8] If the conveyance was to secure

[1] Venderhaise *v.* Hugues, 13 N. J. Eq. (2 Beas.) 410; Ballard *v.* Jones, 6 Humph. (Tenn.) 455.

[2] Meehan *v.* Forrester, 52 N. Y. 277.

[3] Daniels *v.* Alvord, 2 Root (Conn.), 196; Belton *v.* Avery, Ib. 279. See, also, Minor *v.* Woodbridge, 2 Root (Conn.), 274.

[4] Watkins *v.* Stockett, 6 Har. & J. (Md.) 435.

[5] Sowell *v.* Barrett, 1 Busb. (N. C.) Eq. 50; Lewis *v.* Owen, 1 Ired. (N. C.) Eq. 290; Allen *v.* McRae, 4 Ib. 325.

[6] §§ 282–342.

[7] Chowning *v.* Cox, 1 Rand. (Va.) 306; Pennington *v.* Hanby, 4 Munf. (Va.) 140. See § 332.

[8] Sherwood *v.* Wilson, 2 Sweeny (N. Y.), 684; Skinner *v.* Miller, 5 Litt. (Ky.) 84; Thompson *v.* Campbell, 6 T. B. Mon.

a general indebtedness, and neither party supposed the land would be redeemed, upon a redemption by an execution creditor of the mortgagor, the mortgagee should be allowed also for the value of improvements made by him.[1] The grantee by an absolute deed, apparently having an absolute title, may convey the property to a *bonâ fide* purchaser, discharged of all right of redemption, and in such case the only remedy of the mortgagor is a personal one against the mortgagee.[2] The estate is discharged of the right to redeem. The length of time that has elapsed after the making of an absolute deed, before any steps are taken towards redeeming, is an important element in determining whether the grantor has the right to redeem.[3]

1061. An assignee of the equity of redemption may generally redeem, whether he holds under a voluntary assignment or by an assignment in law;[4] and it is immaterial that the land is in the possession of a disseisor.[5]

It is not necessary for the assignee to prove that the assignment was made on a valuable consideration.

The mortgagor's assignee is under no obligation to redeem from a prior mortgage, unless he has expressly or impliedly agreed to do so. If he has bought subject to the mortgage without assuming it, or if he has purchased the equity of redemption at an execution sale, he has the right, if he chooses to do so, to redeem, but he cannot be compelled to do so.[6]

1062. Upon the death of the mortgagor or owner of the equity of redemption his heir at law may redeem.[7] If, however, the mortgagor devised the equity of redemption, the devisee is the proper party to redeem,[8] and in that case the heir at law need not be made a party unless he contests the will. During the pendency of a suit to establish the will, an heir cannot make a sale of the equity which will be valid against a devisee, or which

(Ky.) 120. As to form of decree, see L. R. 5 Ch. App. 229.

[1] Blair *v.* Chamblin, 39 Ill. 521.

[2] Whittick *v.* Kane, 1 Paige (N. Y.), 202. See §§ **339–342.**

[3] Mellish *v.* Robertson, 25 Vt. 603. See § **330.**

[4] Thorne *v.* Thorne, 1 Vern. 182; White *v.* Bond, 16 Mass. 400; Dunlap *v.* Wilson, 32 Ill. 517; Scott *v.* Henry, 13 Ark. 112.

[5] Wellington *v.* Gale, 13 Mass. 488, per Parker, C. J. Otherwise in **North Carolina** when the bill is against the mortgagor as well as the mortgagee. Medley *v.* Mask, 4 Ired. (N. C.) Eq. 339.

[6] Rogers *v.* Meyers, 68 Ill. 92.

[7] Pym *v.* Bowreman, 3 Swanst. 241, n.; Saunders *v.* Hawkins, 8 Vin. Abr. 156.

[8] Lewis *v.* Nangle, 2 Ves. Sen. 431; Philips *v.* Hele, 1 Ch. R. 190.

will prevent his redeeming after his right under the will is established.[1] A legatee whose legacy is made a charge upon the mortgaged estate may redeem. If land be specifically devised, it is presumed, in the absence of an expressed intention to the contrary, that the land is to be exonerated from all mortgages placed upon it by the testator; and the general rule prevails even when several parcels are devised to different persons and the testator has directed the removal of the incumbrances as to some of the parcels and not as to others.[2] Consequently in such case the executor should redeem.

The guardian of an infant heir may redeem, and so may the guardian of an insane person.[3]

1063. A part-owner of an equity of redemption may redeem,[4] but he cannot require other part-owners to join with him in redeeming from the mortgage.[5] If he elects to redeem, he must pay the whole amount due on the mortgage, and hold it to his own use, unless the other part-owners come in and pay their proper contributory shares.[6] Nor does it make any difference that the holder of the mortgage is also a part-owner of the equity of redemption in common with the mortgagor. Such mortgagee is not bound to receive a part of the mortgage debt, and he may wholly decline paying anything toward the redemption; though he may, like any part-owner, at his election, contribute to the payment of the redemption money and share the benefits of the payment.[7]

A mortgage of a railroad company covering the whole line of its road lying in two states may be redeemed by a purchaser upon execution of the equity of redemption of the part of the road situate in one state.[8]

One tenant in common of an equity of redemption may redeem in order to protect his own interest;[9] but by so doing he is not entitled to the whole property to the exclusion of his co-tenant. The redemption by one enures to the benefit of the other so far as

[1] Finch *v.* Newnham, 2 Vern. 216.

[2] Richardson *v.* Hill, 124 Mass. 228.

[3] Powell Mort. 285 *a*, note; Pardee *v.* Van Anken, 3 Barb. (N. Y.) 534.

[4] Howard *v.* Harris, 1 Vern. 33; Pearce *v.* Morris, L. R. 5 Ch. App. 227; Taylor *v.* Porter, 7 Mass. 355.

[5] Ex parte Willard, 5 Wend. (N. Y.) 94; Boqut *v.* Coburn, 27 Barb. (N. Y.) 230; Hubbard *v.* Ascutney Mill Dam Co. 20 Vt. 402; Gibson *v.* Crehore, 5 Pick. (Mass.) 146.

[6] Taylor *v.* Porter, 7 Mass. 355; Calkins *v.* Munsel, 2 Root (Conn.), 333.

[7] Merritt *v.* Hosmer, 11 Gray (Mass.), 276.

[8] Wood *v.* Goodwin, 49 Me. 260.

[9] Wynne *v.* Styan, 2 Ph. 306.

to save a forfeiture. . The co-tenant may be compelled to pay his proportion of the debt. The tenant who redeems becomes subrogated to the right of the mortgagee, and if his co-tenant does not pay his share, he may be foreclosed of his right to redeem. The tenant in possession, and in receipt of the whole of the rents, is subject to account with his co-tenant.[1] But neither has an equitable right to redeem the whole and keep the other from sharing in the redemption.[2]

In like manner where land is conveyed to two persons, one of whom pays his half of the purchase money, and joins with his co-tenant in a mortgage of the whole estate to secure the payment of the other half, and afterwards releases his interest to the mortgagee, his co-tenant cannot redeem without paying the whole amount of the mortgage.[3]

But one tenant in common cannot redeem his share only of the estate, as this would be in violation of the principle that a mortgage must be wholly redeemed or not at all;[4] and a partition of the estate with his co-tenant, unless consented to by the mortgagee, does not affect him, and his consent cannot be demanded.[5]

1064. A subsequent mortgagee may redeem from a prior mortgagee at any time after the maturity of the prior mortgage;[6] but if he brings a bill to redeem within the time limited by statute and fails to prosecute it, the owner of the equity of redemption cannot, after that time has expired, maintain a bill to be let in to prosecute the bill to redeem brought by such mortgagee. The junior mortgagee is under no obligation to redeem

[1] Bentley *v.* Bates, 4 Y. & C. Exch. 182; Gibson *v.* Crehore, 5 Pick. (Mass.) 152; Young *v.* Williams, 17 Conn. 393; Kingsbury *v.* Buckner, 70 Ill. 514; McLaughlin *v.* Curts, 27 Wis. 644.

[2] Seymour *v.* Davis, 35 Conn. 264.

[3] Crafts *v.* Crafts, 13 Gray (Mass.), 360.

[4] Pow. Mort. 342 *a*, note.

[5] Watkins *v.* Williams, 3 Mac. & G. 622; 16 Jur. 181. See § 706.

[6] Bigelow *v.* Wilson, 1 Pick. (Mass.) 493; Haines *v.* Beach, 3 Johns. (N. Y.) Ch. 460; Pardee *v.* Van Anken, 3 Barb. (N. Y.) 534; Jenkins *v.* Continental Ins. Co. 12 How. (N. Y.) Pr. 66; Frost *v.* Yonkers Savings Bank, 70 N. Y. 553; Dings *v.* Parshall, 7 Hun (N. Y.), 522; Scott *v.* Henry, 13 Ark. 112; Kimmell *v.* Willard, 1 Dougl. (Mich.) 217; Sager *v.* Tupper, 35 Mich. 134; Hill *v.* White, 1 N. J. Eq. (Saxt.) 435; Wiley *v.* Ewing, 47 Ala. 418; Morse *v.* Smith, 83 Ill. 396. See 2 Fisher Mort. 3d ed. 765.

In **South Carolina** it is provided by statute that subsequent mortgagees, although they have not recorded their mortgages, may redeem prior mortgages; but that any person who shall mortgage the same lands a second time while the former mortgage is in force and not discharged shall have no power or liberty of redemption, in equity or otherwise. Rev. Stat. 1873, p. 424.

the prior mortgage, or to prosecute a suit for the purpose, or to do any act to prevent the first mortgagee from foreclosing.[1]

The language of most of the cases is broad enough to establish the doctrine that a junior mortgagee, simply as such and under all circumstances, has the absolute right to pay off or redeem from a senior mortgage past due. But it is intimated in a few cases that such a right may not exist when the senior mortgagee desires to hold his mortgage as an investment, and does not seek or threaten to enforce its collection. In such case the junior mortgagee may be in no danger of loss or embarrassment, and thus may not have any equitable right to disturb or interfere with the senior mortgage to which he is not a party, and for the payment of which he is in no way liable.[2] This question would rarely arise, because generally if the property is ample to satisfy the junior mortgagee he will foreclose his mortgage instead of making a further investment in the first mortgage. If the holder of the first mortgage is seeking to enforce his security there can be no question of the right of the holder of the junior mortgage to redeem.[3]

This right of a junior mortgagee to redeem is a common law right, and is entirely independent of a right of redemption given to creditors and limited to a specified time. It applies to deeds of trust to secure the payment of debts as well as to mortgages proper.[4] The junior mortgagee may redeem although his mortgage be of an estate subject to a homestead right, and therefore only a reversionary interest after the expiration of that right.[5]

As between several persons entitled to redeem, redemption will be decreed according to the priority of the claimants.[6]

A subsequent mortgagee, who has assigned his mortgage as collateral security for a debt of his own, may redeem the mortgaged premises from a sale under a prior mortgage; and his redemption enures to the benefit of his assignee. He has such an interest in the property as, with the consent of the holder of the certificate

[1] McIntier *v.* Shaw, 6 Allen (Mass.), 83.

[2] Frost *v.* Yonkers Savings Bank, 70 N. Y. 553, 557, per Earl, J.; and to like effect see Bigelow *v.* Cassedy, 26 N. J. Eq. 557, 562, per Van Syckel, J.

[3] Frost *v.* Yonkers Savings Bank, *supra*; Ellsworth *v.* Lockwood, 42 N. Y. 89; Norton *v.* Warner, 3 Edw. (N. Y.) Ch. 106.

[4] Wiley *v.* Ewing, 47 Ala. 418; Beach *v.* Shaw, 57 Ill. 17; Hodgen *v.* Guttery, 58 Ill. 431.

[5] Smith *v.* Provin, 4 Allen (Mass.), 516.

[6] Moore *v.* Beasom, 44 N. H. 215; Brewer *v.* Hyndman, 18 N. H. 9.

of foreclosure sale, gives him the right to redeem in order to protect that claim.[1]

1065. A tenant for life,[2] or a tenant in tail,[3] may redeem; as may also a remainder-man or reversioner, though the life tenant is entitled to the first option,[4] and by taking an assignment of the mortgage himself may prevent a redemption by the remainder-man;[5] but he cannot compel the remainder-man to redeem him. So, also, one who has a life estate in remainder, or other contingent interest, may redeem.[6]

1066. A tenant for years may redeem,[7] although his lease being made after the mortgage, and good against the mortgagor, is not good against the mortgagee;[8] and although the lessor, being also the mortgagor, has released his equity of redemption to the holder of the mortgage.[9]

A lessee of the mortgagor having a lease valid against him, though not binding upon the mortgagee for the reason that it was made after the mortgage, has a redeemable interest,[10] and it does not matter that the leasehold premises are only a part of the mortgaged estate.[11]

It has been held, also, that a person in possession of the land under a verbal contract to buy it may redeem;[12] and a person having only an easement in the land may redeem.[13]

1067. A widow who has joined in a mortgage in release of dower may redeem, for she is entitled to dower as against every person except the mortgagee and those claiming under him.[14] It is only when the mortgage debt is paid, or when the mortgagee does not object, that her dower can be assigned. But she can redeem without a legal assignment of it.[15] If any person claiming

[1] Manning *v.* Markel, 19 Iowa, 103.

[2] Wicks *v.* Scrivens, 1 J. & H. 215; Aynsly *v.* Reed, 1 Dick. 249; Evans *v.* Jones, Kay, 29; Lamson *v.* Drake, 105 Mass. 564.

[3] Playford *v.* Playford, 4 Hare, 546.

[4] Ravald *v.* Russell, Younge, 9.

[5] Raffety *v.* King, 1 Keen, 601.

[6] Davis *v.* Wetherell, 13 Allen (Mass.), 60; Ravald *v.* Russell, *supra.*

[7] Hamilton *v.* Dobbs, 19 N. J. Eq. 227; Averill *v.* Taylor, 8 N. Y. 44; Bacon *v.* Bowdoin, 22 Pick. (Mass.) 401.

[8] Keech *v.* Hall, 1 Doug. 21.

[9] Bacon *v.* Bowdoin, 2 Met. (Mass.), 591.

[10] Keech *v.* Hall, 1 Doug. 21, per Lord Mansfield; Averill *v.* Taylor, 8 N. Y. 44.

[11] Averill *v.* Taylor, *supra.*

[12] Lowry *v.* Tew, 3 Barb. (N. Y.) Ch. 407.

[13] Bacon *v.* Bowdoin, 22 Pick. (Mass.) 405; 2 Met. 591. See, however, § **1059**, and McDougald *v.* Capron, 7 Gray (Mass.), 278.

[14] Opdyke *v.* Bartles, 11 N. J. Eq. (3 Stock.) 133; McArthur *v.* Franklin, 16 Ohio St. 193; Denton *v.* Nanny, 8 Barb. (N. Y.) 618.

[15] Henry's case, 4 Cush. (Mass.) 257; Eaton *v.* Simonds, 14 Pick. (Mass.) 98;

under her husband redeems, she may repay her proportion of the amount so paid, and have her dower in the whole estate. But if she herself redeems from the mortgagee, or from his assignee, she must pay the whole amount due on the mortgage.[1] She has an undoubted right to do this although she has released her dower in the mortgage.[2] And even a wife having only an inchoate right of dower may redeem land from a mortgage in which she has joined with her husband to release dower.[3] A foreclosure of the mortgage in the lifetime of the husband, by a suit in equity to which she was not made a party, does not cut off her right of redemption;[4] though when the foreclosure is by a writ of entry, or by *scire facias*, it is not necessary to join the wife as a party in order to bar her right of redemption.[5] A widow in bringing a bill in equity to redeem should show that she has no remedy in law to recover her dower; and should therefore set forth that her husband was seised during coverture of only an equity of redemption, or that if he was seised of the legal estate she joined him in the mortgage.[6]

Under a statute making it the duty of an administrator to pay liens and mortgages upon the estate of the deceased in preference to his general debts, if the administrator, having in his hands sufficient personal property for the purpose, suffers a mortgage to be foreclosed, the widow of the deceased is entitled to recover of the administrator the same proportion of the personal assets she would have had in the land, had these assets been applied in discharge of the mortgage. It is immaterial in this respect that the mortgage was given for purchase money and the wife did not join in the mortgage.[7] Her joining in the mortgage operates as a waiver of her right only in favor of the mortgagee; and her right to her

Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Peabody *v.* Patten, 2 Ib. 519.

[1] Newton *v.* Cook, 4 Gray (Mass.), 46; Gibson *v.* Crehore, 5 Pick. (Mass.) 146; McCabe *v.* Bellows, 7 Gray (Mass.), 148; Brown *v.* Lapham, 3 Cush. (Mass.) 554. The decisions in Gibson *v.* Crehore, 5 Pick. (Mass.) 151, and Van Vronker *v.* Eastman, 7 Met. (Mass.) 157, are not in conflict with the doctrine stated, as in those cases the mortgagee did not object to a redemption on the payment of a proportional part.

[2] McCabe *v.* Bellows, 1 Allen (Mass.), 269.

[3] Davis *v.* Wetherell, 13 Allen (Mass.), 60; Lamb *v.* Montague, 112 Mass. 352.

[4] Mills *v.* Van Voorhies, 20 N. Y. 412; 10 Abb. Pr. 152; Wheeler *v.* Morris, 2 Bosw. (N. Y.) 524.

[5] Pitts *v.* Aldrich, 11 Allen (Mass.), 39.

[6] Messiter *v.* Wright, 16 Pick. (Mass.) 151; Davis *v.* Wetherell, 13 Allen (Mass.), 60; Whitcomb *v.* Sutherland, 18 Ill. 578.

[7] Morgan *v.* Sackett, 57 Ind. 580; 2 R. S. of Ind. 1876, p. 534.

share in the real estate is absolute against general creditors of her husband.[1]

An estate of homestead entitles the holder of it to redeem.[2]

A tenant by the curtesy may in like manner redeem.

A jointress having a jointure in the whole or any part of the mortgaged estate has a redeemable interest in it.[3] And although she grants a term for years out of her estate for life, so long even as ninety-nine years, "there rests a reversion in her which naturally attracts the redemption."[4]

1068. A surety of a debt secured by a junior mortgage upon payment of the debt is entitled by subrogation to the rights of such mortgagee to redeem from a prior mortgagee.[5] It is his right to avail himself of the security held by the creditor. He thereupon stands in the place of the creditor, and may enforce the security against the property mortgaged and the person primarily liable without any assignment to himself of the mortgage.[6]

1069. A judgment creditor of the mortgagor may redeem.[7] It is not necessary that an execution should first be issued, or the land sold.[8] But a general creditor whose claim is not a charge upon the mortgaged estate has no right of redemption.[9] A mortgagee who has sold the mortgaged premises under a decree of court, having a personal judgment for a deficiency, has been deemed a judgment creditor entitled to redeem from the purchaser at the foreclosure sale, where redemption after such sale is allowed by statute.[10]

The purchaser of an equity of redemption sold on execution has

[1] Perry *v.* Barton, 25 Ind. 274; Newcomer *v.* Wallace, 30 Ind. 216; Hunsucker *v.* Smith, 49 Ind. 114.

[2] Jones *v.* Meredith, Bunb. 347; Casborne *v.* Inglis, 2 Jac. & W. 194; 1 Atk. 603; Stone *v.* Godfrey, 18 Jur. 162.

[3] Howard *v.* Harris, 1 Vern. 33.

[4] Brend *v.* Brend, 1 Vern. 213.

[5] Wright *v.* Morley, 10 Ves. 12; Crisp, *Exp.* 1 Atk. 133; Mahew *v.* Crickett, 2 Swanst. 185; Wade *v.* Coope, 2 Sim. 155; Green *v.* Wynn, L. R. 4 Ch. App. 204; Averill *v.* Taylor, 8 N. Y. 44.

[6] Averill *v.* Taylor, *supra.*

[7] Mildred *v.* Austin, L. R. 8 Eq. 220; Stonehewer *v.* Thompson, 2 Atk. 440; Bank of Niagara *v.* Rosevelt, 9 Cow. (N. Y.) 409; S. C. Hopk. Ch. 579; Van Buren *v.* Olmstead, 5 Paige (N. Y.), 9; Quin *v.* Brittain, Hoff. (N. Y.) Ch. 353; Augur *v.* Winslow, Clarke (N. Y.), Ch. 258; Brainard *v.* Cooper, 10 N. Y. 356; Benedict *v.* Gilman, 4 Paige (N. Y.), 58; Dauchy *v.* Bennett, 7 How. (N. Y.) Pr. 375; Hitt *v.* Holliday, 2 Litt. (Ky.) 332; Stainback *v.* Geddy, 1 Dev. & B. (N. C.) Eq. 479.

[8] Cases above, and Brainard *v.* Cooper, *supra.*

[9] Story's Eq. Jur. § 1023; Grant *v.* Duane, 9 Johns. (N. Y.) 611.

[10] Greene *v.* Doane, 57 Ind. 186. See § 1334.

a right to redeem,[1] although the land be in the possession of a disseisor.[2] And so has a judgment creditor to whom the premises have been set off by extent and appraisement, without any deduction on account of the incumbrance.[3] An assignee in bankruptcy, or a trustee appointed by the court or under an assignment from the debtor, may also redeem.[4]

A creditor of the mortgagor having an attachment upon the mortgaged premises may bring a bill in equity to redeem.[5] The mortgagor has a paramount right to redeem, and if he bring a bill to redeem pending a bill by the creditor for the same purpose, he is entitled to a decree for redemption in preference; but he will not be allowed in this manner to unreasonably delay the redemption. A divorced woman who has attached the land of her former husband to secure his payment of alimony to her is entitled, like any attaching creditor, to redeem.[6]

5. *The Sum payable to effect Redemption.*

1070. Payment of the amount due on the mortgage is a necessary condition precedent to redemption.[7] If the holder of the mortgage has paid prior incumbrances for the protection of the estate, the person redeeming is required to add the amounts so paid to the mortgage debt, both because the estate is benefited to that amount, and because the holder of the mortgage by paying such incumbrance is subrogated to the claim, and holds it as a charge upon the property as much as he does the mortgage to which he has direct title. Where a prior mortgage upon payment by a junior mortgagee was discharged of record, and the plaintiff afterward acquired his title while the defendant's mortgage was apparently the only incumbrance, the defendant was allowed the amount so paid by him, inasmuch as the whole amount claimed by him was less than the amount of his own mortgage as it appeared of record.[8]

[1] Coombs *v.* Carr, 55 Ind. 303.

[2] Wellington *v.* Gale, 13 Mass. 488; Atkins *v.* Sawyer, 1 Pick. (Mass.) 354.

[3] White *v.* Bond, 16 Mass. 400.

[4] Francklyn *v.* Fern, Barnard. 30.

[5] Chandler *v.* Dyer, 37 Vt. 345; Bridgeport *v.* Blinn, 43 Conn. 274.

In **New Hampshire** it is provided by statute that an attaching creditor, either before or after execution, may redeem. Gen. Stat. c. 205, §§ 8, 10, 11.

[6] Briggs *v.* Davis, 108 Mass. 322.

[7] Fogal *v.* Pirro, 17 Abb. (N. Y.) Pr. 113; 10 Bosw. 100; Childs *v.* Childs, 10 Ohio St. 339; Cowles *v.* Marble, 37 Mich. 158.

[8] Davis *v.* Winn, 2 Allen (Mass.), 111.

If the mortgage be for anything else than the payment of money, the condition of the mortgage, whatever it be, must be fulfilled. The mortgagor may also be required to perform a condition not contained in the mortgage; as where the mortgagee conveyed the estate to the mortgagor by a deed imposing a condition, and took back a purchase money mortgage, the mortgagor was not allowed to redeem except upon performing the condition of the mortgage and that of the deed as well.[1]

Redemption from a foreclosure sale within the time allowed by statute in several states may be made by paying the purchaser the amount of his bid with interest. This rule applies although the purchaser be the senior mortgagee, and the amount of his bid be less than the amount of the mortgage debt, and redemption is sought by one interested in the equity of redemption who was made a party to the foreclosure suit. Such a redemption is not a redemption from the mortgage, but a redemption from the sale, and is a statutory right.[2]

1071. The mortgagee after default is said to be entitled to notice of payment, on the ground that redemption being a matter of equity only, the person seeking to redeem should do equity, by allowing a reasonable time to the mortgagee to find a new investment for his money. According to the English practice, six months is the proper time of notice; and if the notice be not given, six month's interest is paid in lieu of notice.[3] Although some notice is always proper, there is no established rule or custom regulating it in this country. Of course, if the mortgagee demands his money no notice is necessary; nor is there when he has taken proceedings to enforce his claim, which amount to a demand.[4]

1072. It is a general rule that a mortgage is an entire thing, and must be redeemed entire, and that the mortgagee cannot be compelled to divide his debt and his security.[5] He performs his whole duty when he releases the entire estate upon

[1] Stone *v.* Ellis, 9 Cush. (Mass.) 95.

[2] Day *v.* Cole, 44 Iowa 452; Tuttle *v.* Dewey, 44 Iowa, 306, distinguished on this ground from Johnson *v.* Harmon, 19 Iowa, 56.

[3] Fisher Mort. § 1272, 3d ed.; Browne *v.* Lockhart, 10 Sim. 424; Bartlett *v.* Franklin, 15 W. R. 1077.

[4] Letts *v.* Hutchins, L. R. 13 Eq. 176.

[5] Palk *v.* Clinton, 12 Ves. 48; Cholmondeley *v.* Clinton, 2 Jac. & W. 189; Lamb *v.* Montague, 112 Mass. 352; Merritt *v.* Hosmer, 11 Gray (Mass.), 276; Gliddon *v.* Andrews, 14 Ala. 733; Knowles *v.* Rablin, 20 Iowa, 101; White *v.* Hampton, 13 Iowa, 259; Street *v.* Beal, 16 Iowa, 68; Lanning *v.* Smith, 1 Pars. (Pa.) Sel. Cas. 13.

receiving payment of the whole debt in one payment. The fact that the mortgaged premises have subsequently become divided, and are held in separate parcels by different owners, does not concern him, or put him under any obligation to receive payment of his mortgage in parts from the different owners.[1]

On a bill to redeem, a prior conditional judgment on a writ of entry to foreclose is conclusive evidence of the amount then due on the mortgage.[2]

The rule is the same, although two separate estates are mortgaged by distinct deeds, in case the condition of each is to pay one and the same mortgage debt. A creditor who levies an execution upon one estate becomes entitled to redeem both estates upon payment of the whole mortgage debt; but he cannot be permitted to redeem only the estate levied upon, by paying such proportion of the mortgage debt as that estate bears to the value of the whole mortgaged premises. The debt being one, the mortgage is one also. The unity of the debt makes the equity of redemption, though created by two instruments, one and indivisible.[3]

1073. The fact that the mortgagee has proved against the insolvent estate of a deceased mortgagor the mortgage debt, less the full estimated value of the land, and has received a dividend on that amount, does not preclude his claiming the full amount remaining due on the mortgage upon a bill to redeem subsequently brought against him by one who has purchased the equity of redemption from the heirs at law.[4] And the fact that the mortgagor has obtained a discharge, under bankruptcy or insolvency proceedings, from his personal liability for the mortgage debt, does not in any way relieve him from paying the debt in full upon redemption, whatever may be the value of the property.[5]

1074. When the mortgagee has foreclosed a part of the premises, redemption may be made of the remaining portion of the premises upon payment of a part of the debt.[6] Land subject to a mortgage was sold with full covenants of warranty in two

[1] Johnson *v.* Candage, 31 Me. 28; Smith *v.* Kelley, 27 Me. 237; Mullanphy *v.* Simpson, 4 Mo. 319. But see Morse *v.* Smith, 83 Ill. 396.

[2] Stevens *v.* Miner, 5 Gray (Mass.), 429, note; Sparhawk *v.* Wills, 5 Gray (Mass.), 423.

[3] Franklin *v.* Gorham, 2 Day (Conn.), 142.

[4] Davis *v.* Winn, 2 Allen (Mass.), 111.

[5] Childs *v.* Childs, 10 Ohio St. 339.

[6] Dukes *v.* Turner, 44 Iowa, 575, 579; distinguished from Street *v.* Beal, 16 Iowa, 68, where the mortgagee retained all the property.

lots to different persons at different times, and the mortgagee afterwards entered upon both lots for foreclosure, and the foreclosure became absolute as to the lot last sold; whereupon the owner of the lot sold first brought a bill to redeem, and was allowed to do so upon paying the balance due upon the mortgage debt, after deducting the full value of the other lot with the buildings upon it; and it was regarded as immaterial that the buildings were erected after the sale by the mortgagor.[1]

But this rule does not apply where the mortgage has been foreclosed without making all of the several owners of the land parties to the suit, and the mortgagee has purchased at the sale, because he has by such proceeding and purchase voluntarily severed his right, and obtained an indefeasible title to part of the land and only a defeasible title to another part. The owner not made a party may redeem the portion owned by him on paying a part of the mortgaged debt bearing such a proportion to the whole as the value of his land bears to that of the whole mortgaged premises.[2] Two persons owning land in common made a mortgage of it, and one of them afterwards mortgaged his undivided half to another person. The first mortgagee obtained a decree of foreclosure and sale in a suit in which the second mortgagee was not made a party. It was held that the second mortgagee, not being bound by the foreclosure, might redeem an undivided half upon payment of the whole mortgage, less one half the proceeds of the foreclosure sale of the whole land.[3]

1075. One who redeems after a foreclosure sale must pay the whole amount of the mortgage debt, although the land sold for a less sum.[4] The grounds for this rule are clearly stated by Mr. Justice Bradley of the United States Supreme Court: "To redeem property which has been sold under a mortgage for less than the mortgage debt, it is not sufficient to tender the amount of the sale. The whole mortgage debt must be tendered or paid into court. The party offering to redeem proceeds upon the hypothesis that, as to him, the mortgage has never been fore-

[1] George *v.* Wood, 11 Allen (Mass.), 41. See Fogal *v.* Pirro, 10 Bosw. (N. Y.) 100.

[2] Green *v.* Dixon, 9 Wis. 532.

[3] Kirkham *v.* Dupont, 14 Cal. 559; and see Frink *v.* Murphy, 21 Cal. 108; Grattan *v.* Wiggins, 23 Cal. 16.

[4] Benedict *v.* Gilman, 4 Paige (N. Y.), 58; Raynor *v.* Selmes, 52 N. Y. 579; Robinson *v.* Ryan, 25 N. Y. 320; Gage *v.* Brewster, 31 N. Y. 218; Bradley *v.* Snyder, 14 Ill. 263; Baker *v.* Pierson, 6 Mich. 523; Johnson *v.* Harmon, 19 Iowa, 56; Martin *v.* Fridley, 23 Minn. 13.

closed and is still in existence. Therefore he can only lift it by paying it. The money will be subject to distribution between the mortgagee and the purchaser in equitable proportions, so as to reimburse the latter his purchase money, and pay the former the balance of his debt."[1] In case the mortgagee has bid in the property and afterwards sold portions of it to others, the money paid in redemption should be distributed among the grantees on the basis of the prices paid by them for their purchases, and in the order of the conveyances to them.[2]

A junior incumbrancer who, not having been made a party to a foreclosure of a prior mortgage, afterwards redeems, redeems not the premises, strictly speaking, but the prior incumbrance; and he is entitled, not to a conveyance of the premises, but to an assignment of the security.[3] Therefore if the prior mortgagee in such case has become the purchaser at the foreclosure sale and has thus acquired the equity of redemption of the mortgaged premises, the junior mortgagee upon redeeming is not entitled to a conveyance of the estate, but to an assignment of the prior mortgage; whereupon the prior mortgagee, as owner of the equity of redemption, may if he choose pay the amount due upon the junior mortgage, redeeming that. The decree in such case would be that the junior mortgagee redeem the first mortgage; that the first mortgagee, as owner of the equity of redemption, redeem from the junior mortgage, and if he fail to do so that the premises be sold, and out of the proceeds there be paid, first, the prior mortgage and interest, together with any claim for repairs the first mortgagee may have made upon the premises while in possession; second, the remainder to the payment of the second mortgage and interest upon it, and in case there be a surplus, this to be paid to the first mortgagee as owner of the equity of redemption.[4]

In case a mortgagor or owner of the equity of redemption redeem after a foreclosure sale to which he was not made a party, and the purchaser has entered into possession, the amount to be paid in order to effect a redemption is the amount of the mortgage debt with interest, and the value of improvements made by the purchaser, less the rents and profits received by him.[5]

[1] Collins *v.* Riggs, 14 Wall. 491.

[2] Davis *v.* Duffie, 18 Abb. (N. Y.) Pr. 360.

[3] Fell *v.* Brown, 2 Bro. C. C. 276; Pardee *v.* Van Anken, 3 Barb. (N. Y.) 534, 537; Renard *v.* Brown, 7 Neb. 449.

[4] Renard *v.* Brown, *supra.*

[5] Barrett *v.* Blackman, 47 Iowa, 565.

1076. Under special circumstances redemption of a portion of the mortgaged estate may be made without paying the mortgage debt, or even contributing towards it; as, for instance, where the owner of such portion held under a warranty deed, and the remaining portion, which was sufficient to satisfy the mortgage debt in full, was owned by the assignee of the mortgage.[1]

Another exception is made in favor of a railway or other corporation to which a right to take land has been granted by a general law or a special act. In such case the corporation, upon taking the land necessary for its right of way, may redeem such part of a mortgage as covers the land so taken without paying the whole mortgage debt.[2]

When a mortgagee enters to foreclose for a breach of condition in the non-payment of interest, and the mortgagor brings a bill to redeem, pending which the principal becomes due, he is not entitled to a decree except upon paying the whole sum then due, both principal and interest.[3]

1077. When part only of the debt is due. — When an entry has been made for a breach of condition in the non-payment of one of several sums secured by the mortgage, and the mortgagor wishes to redeem, the mortgagee is not obliged to accept the amounts not yet due; but to avoid the manifest injustice of a foreclosure, the court will make a special decree, upon payment of the sum due, declaring that the proceedings shall stand open, leaving the mortgagee in possession until the further sum shall become due.[4] The mortgagor, on paying all that is due, and thus performing the condition so far as he is able, regains the title of the estate. But if all the sums have become payable before the mortgagor brings his bill to redeem, he must pay the whole sum due on the mortgage, and not merely the sum for the non-payment of which the entry was made, before he is entitled to a decree.[5]

The remedy of a mortgagor, or of one claiming under him, entitled to redemption, is by a bill in equity, and cannot be obtained in a suit at law. His estate is only an equitable one.[6] When,

[1] Bradley *v.* George, 2 Allen (Mass.), 392.

[2] Dows *v.* Congdon, 16 How. (N. Y.) Pr. 571; North Hudson County R. R. Co. *v.* Booraem, 28 N. J. Eq. 450.

[3] Adams *v.* Brown, 7 Cush. (Mass.) 220.

[4] Saunders *v.* Frost, 5 Pick. (Mass.) 259.

[5] Mann *v.* Richardson, 21 Pick. (Mass.) 355; Deming *v.* Comings, 11 N. H. 474.

[6] Pearce *v.* Savage, 45 Me. 90; Smith *v.* Anders, 21 Ala. 782.

therefore, the mortgagor seeks to regain his legal estate and the possession of it in a court of equity, he must do equity to the mortgagee, by paying all that is actually due upon the mortgage up to the time of redemption; so that if the mortgagee has entered for a breach of the condition by non-payment of interest, and the principal becomes due pending the mortgagor's bill to redeem, a decree for redemption can only be had upon payment of both principal and interest.[1]

The rule is the same when foreclosure is effected by suit in equity, and a decree is obtained upon one note before the maturity of others. Redemption may be had by the payment of this note before completion of the sale, leaving the premises subject to the notes not due.[2] When redemption is allowed after sale, and the holder of the first maturing note forecloses, the holder of a note subsequently maturing may redeem from the foreclosure sale, and may himself foreclose for the satisfaction of his own note, and not for the amount paid by him to redeem from the first foreclosure. The holders of the several notes have the same right to redeem that they would have if the notes were secured by separate mortgages.[3] In the same way if the plaintiff has two mortgages upon the same premises, one of which is due and the other not due, redemption may be had upon payment of that only which is due.[4]

1078. Sometimes it is provided in the mortgage that upon default the whole sum shall become due immediately, and in such case the rule generally is that the premises may be foreclosed or sold under a power, for the payment of the whole debt, and that the mortgagor will not be allowed to redeem that part of the debt merely upon which the default occurred, and to have the mortgage continue as to the part not due.[5] In Illinois, however, such a provision has been regarded in the nature of a penalty, and relief against it is given in equity upon payment of the instalment due with interest, and costs incurred in any proceeding to sell under a power or in a foreclosure suit.[6]

1079. If a mortgage be given to secure advances to be

[1] Adams *v.* Brown, 7 Cush. (Mass.) 220; Mann *v.* Richardson, 21 Pick. (Mass.) 355.

[2] Hocker *v.* Reas, 18 Cal. 650.

[3] Davis *v.* Langsdale, 41 Ind. 399; State Bank *v.* Tweedy, 8 Blackf. (Ind.) 447; Preston *v.* Hodgen, 50 Ill. 56.

[4] Lamson *v.* Sutherland, 13 Vt. 309.

[5] § 76, and chapter xxv.

[6] Tiernan *v.* Hinman, 16 Ill. 400.

made to the mortgagor, and further advances are made under an oral agreement that the mortgage shall secure them, neither the mortgagor nor any one having no higher equity can redeem without allowing for such advances.[1] A mortgage cannot, by such an agreement, be continued in force as security for a new indebtedness not embraced in the terms of its condition; yet if the mortgagee has advanced money to the mortgagor on the strength of such an agreement, a court of equity will not aid the mortgagor, or any one who has purchased from him with knowledge of the facts, in obtaining a discharge of the mortgage.[2] If a mortgagee holding the title absolutely make unauthorized advances to other persons for such a purpose as cutting timber upon the lands, the mortgagor can redeem without paying them;[3] but if he make further advances to the mortgagor or on his order, these should be allowed him on a bill to redeem.[4]

Where a mortgage is given as security for a loan, and future advances agreed in writing to be made on the performance of certain conditions, it would seem that the mortgage could not be redeemed by payment of the loan actually advanced, so long as the liability, under the agreement to make future advances, is outstanding; and it was so decided in a case where an assignee of the equity of redemption, who sought to redeem the mortgage on payment of the loan without indemnifying against the mortgagee's agreement to make future advances, had acquired his title by a deed in which the land was described as subject to a mortgage of $4,000, the whole amount of the loan and future advances, and the obligation for future advances had been assigned by the mortgagor to a person who claimed that the mortgagee should hold the mortgage undischarged as security for him.[5]

1080. A mortgagee who has paid a prior mortgage or other incumbrance upon the land is entitled to be repaid this amount, as well as his own mortgage, when the mortgagor comes to redeem.[6] In addition to the rights the mortgagee had before, he is subrogated to those which were a charge upon the land in the

[1] § 360; Stone *v.* Dane, 10 Allen (Mass.), 74; Ogle *v.* Ship, 1 A. K. Marsh. (Ky.) 287; Reid *v.* Lansdale, Hard. (Ky.) 6.

[2] Upton *v.* Nat. Bank of So. Reading, 120 Mass. 153; Joslyn *v.* Wyman, 5 Allen (Mass.), 62; Brown *v.* Gaffney, 32 Ill. 251.

[3] Kelly *v.* Falconer, 45 N. Y. 42.

[4] Williamson *v.* Downs, 34 Miss. 402.

[5] Cox *v.* Hoxie, 115 Mass. 120.

[6] See §§ 357, 714; Harper *v.* Ely, 70 Ill. 581; Mosier *v.* Norton, 83 Ill. 519;

hands of the prior incumbrancer whom he has paid,[1] whether such incumbrance is a mortgage, a judgment,[2] or a rent-charge.[3] If the outstanding incumbrance embraced not only the land covered by his mortgage, but also other lands, he may recover from the owner of such other lands his proportion of such incumbrance.[4] In the same way the mortgagee is protected in the payment of taxes upon the mortgaged premises, although the mortgage does not provide for the repayment of money paid by the mortgagee for this purpose;[5] or in the payment of any valid assessment for public improvement.[6]

Taxes upon the mortgaged premises paid by a mortgagee very generally, by the terms of the mortgage, would become an additional lien upon the premises under the mortgage. It is provided by statute in some states that the amount so paid by the mortgagee shall constitute a lien and be collectible with the mortgage debt.[7] Such a provision, however, does not entitle the mortgagee to add to the mortgage debt in this way the amount paid by him in purchasing at a tax sale. Such a purchase is not a payment of taxes, but a purchase of a new lien upon the estate independent of his mortgage.[8]

Although a mortgagee has the right to pay taxes and assessments upon the mortgaged property, and collect them as part of the mortgage debt, he cannot, by bidding in the property at a tax sale, deprive the mortgagor of his right to redeem.[9] A mort-

Page *v.* Foster, 7 N. H. 392; Weld *v.* Sabin, 20 N. H. 533; Arnold *v.* Foot, 7 B. Mon. (Ky.) 66.

[1] Jenness *v.* Robinson, 10 N. H. 215.

[2] Silver Lake Bank *v.* North, 4 Johns. (N. Y.) Ch. 370.

[3] Robinson *v.* Ryan, 25 N. Y. 320.

[4] Lyman *v.* Little, 15 Vt. 576.

[5] Kortright *v.* Cady, 23 Barb. (N. Y.) 490; Faure *v.* Winans, Hopk. (N. Y.) Ch. 283; Eagle F. Ins. Co. *v.* Pell, 2 Edw. (N. Y.) 631; Robinson *v.* Ryan, 25 N. Y. 320.

[6] Dale *v.* McEyers, 2 Cow. (N. Y.) 118; Breevort *v.* Randolph, 7 How. (N. Y.) Pr. 398.

[7] New York Stat. 1855, c. 427, § 76; Stat. 1870, c. 280; and Minnesota Revision, 1866, c. 11, § 152. But a mortgagee, who after his foreclosure sale and during the period allowed by statute for redemption after sale has redeemed the mortgaged premises from a tax sale, is not allowed to tack the sum paid for such redemption to the sum for which the premises were sold at the foreclosure sale, and to require a second mortgagee, seeking to redeem, to pay the amount of the two sums as a prerequisite to his redemption; because redemption is allowed by Statute, c. 81, §§ 13–16, upon payment of the amount for which the premises were sold, except that a creditor, on redeeming, must pay liens prior to his own held by the party from whom redemption is made. Nopson *v.* Horton, 20 Minn. 268.

[8] Williams *v.* Townsend, 31 N. Y. 411.

[9] See § 714; Williams *v.* Townsend, 31 N. Y. 411.

gagor is also allowed to redeem against a mortgagee who has bought in an outstanding title, under an arrangement with the mortgagor that it is to be held, like the mortgage, subject to redemption, but after acquiring it insists that he purchased it as a stranger.[1]

1081. A subsequent mortgagee may redeem a prior mortgage without paying any other claim, such as the amount of a judgment the prior mortgagee has obtained against the mortgagor.[2] As against a subsequent incumbrancer, any other debt due from the mortgagor, not a charge upon the mortgaged premises, cannot be tacked to the mortgage.[3] Nor can the mortgagee, by purchasing a mortgage upon other land of the mortgagor, compel him to redeem both mortgages, if either.[4] The mortgagee cannot require the payment of any other debt, not a charge upon the premises, as a condition of a redemption.[5]

When a junior mortgagee seeks to redeem a prior mortgage, he is entitled to a decree upon paying the sum due upon that mortgage, although the holder of the prior mortgage has another claim upon the mortgaged property which is subsequent to the plaintiff's mortgage. The defendant may, however, file a cross-bill to redeem the plaintiff's mortgage, by virtue of the subsequent claim, and in that case the plaintiff would not succeed in redeeming unless he paid both the liens held by the defendant.[6]

1082. The English doctrine of tacking, whereby a junior mortgagee, by purchasing the first mortgage, was allowed to squeeze out an intermediate mortgage or judgment lien, never gained any general recognition in this country, because at an early day registry laws were adopted, and under these priority of registry gave priority of right. Tacking was only allowed when the last mortgagee took his mortgage without notice of the intervening incumbrance. Under laws, therefore, making the recording of the deed notice to all who might come after, there was no chance for the application of this doctrine; and this was so declared in several early cases.[7] In England this unreasonable

[1] Moore *v.* Titman, 44 Ill. 367.

[2] McKinstry *v.* Mervin, 3 Johns. (N. Y.) Ch. 466; Pardee *v.* Van Anken, 3 Barb. (N. Y.) 534; Jenkins *v.* Continental Ins. Co. 12 How. (N. Y.) Pr. 66.

[3] Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35.

[4] Cleaveland *v.* Clark, Brayt. (Vt.) 166.

[5] Burnett *v.* Denniston, 5 Johns. (N. Y.) Ch. 35.

[6] Green *v.* Tanner, 8 Met. (Mass.) 411; Palmer *v.* Fowley, 5 Gray (Mass.), 545, 548.

[7] Grant *v.* U. S. Bank, 1 Caines (N. Y.) Cas. 112 (1804). See § 569.

doctrine, first established through the influence of Sir Matthew Hale,[1] has now at last been abolished.

Neither can the first mortgagee, by purchasing the equity of redemption, squeeze out an intervening mortgage; but the holder of it may still redeem the first mortgage, and compel the holder of the equity of redemption to redeem or be foreclosed.[2]

1083. Consolidating mortgages. — The doctrine in England is, that one holding several mortgages made by the same mortgagor, though of different dates and covering different parcels of land, may consolidate them in one suit for foreclosure, and neither the mortgagor nor a purchaser of the equity of redemption of a parcel covered by one mortgage will be allowed to redeem this parcel, without also redeeming all other mortgages by the same mortgagor held by the plaintiff and included in his suit, whether he acquired them before or since the purchase; and whether the purchaser had notice of the existence of the other mortgages or not. A mortgagee of a lot covered by one of such mortgages stands in the same position as regards redemption as a purchaser for value.[3]

In like manner, in a few cases in this country it has been held that a mortgagor going into equity to redeem is bound to do equity, and on that ground to pay another debt unsecured which he owes to the holder of the mortgage.[4] But the prevailing doctrine is, that a mortgagor may always redeem by paying the specific debt secured by the mortgage, together with such prior liens as the mortgagee may have been compelled to pay for the protection of the mortgage.

It is said that when a mortgagor goes into equity to redeem he must do equity, and therefore pay not only the mortgage debt, but as well all other debts due from him to the mortgagee. This same principle has been applied when the mortgagor has sought the recovery of the surplus proceeds of a foreclosure sale of the premises. But where, on the other hand, the mortgagee seeks a foreclosure, the mortgagor is permitted to redeem upon payment of the mortgage debt alone.[5]

[1] Marsh *v.* Lee, 2 Vent. 337; 1 Ch. Ca. 162; and see Brace *v.* Duchess of Marlborough, 2 P. Wms. 491.

[2] Thompson *v.* Chandler, 7 Me. 377.

[3] Beevor *v.* Luck, L. R. 4 Eq. 537; Tassell *v.* Smith, 2 De G. & J. 713; Vint *v.* Padget, Ib. 611.

[4] Scripture *v.* Johnson, 3 Conn. 211; Powis *v.* Corbet, 3 Atk. 556; Walling *v.* Aikin, 1 McMull. (S. C.) Ch. 1; Bank of S. C. *v.* Rose, 1 Strobh. (S. C.) Eq. 257.

[5] Anthony *v.* Anthony, 23 Ark. 479.

1084. Costs of previous foreclosure. — Upon redemption after foreclosure by one having an interest in the estate who was not made a party to the suit, the costs of the previous foreclosure cannot be added to the principal and interest of the mortgage debt in making up the amount to be paid;[1] nor can the attorney's fees of the mortgagee in the foreclosure suit be added.[2]

But expenses necessarily incurred by a mortgagee in redeeming a prior incumbrance upon the property are justly chargeable to the owner of the estate upon redemption.[3]

In redeeming from one whom the mortgagor has induced to purchase the mortgage, upon his promise in writing to pay the whole sum advanced with interest, an assignee of the equity of redemption with notice must pay all that the mortgagor must have paid.[4]

1085. Over-payment to prevent foreclosure. — If a mortgagor is compelled to pay to a mortgagee in possession more than is legally due, in order to redeem and prevent a foreclosure, the payment is such a compulsory one as entitles the mortgagor to recover the amount over-paid in an action for money had and received.[5] In such action the same legal and equitable rules are applied which are applicable to a settlement of the mortgagee's account upon a bill in equity to redeem; and whether the mortgagee's charges are reasonable is not an open question to be left to the jury, but a question of law to be decided by the court, according to the facts and circumstances found by the jury.

In like manner where redemption is allowed for a certain time after a foreclosure sale, the person entitled to redeem may properly pay under protest in order to save the estate, whatever the officer may demand, though it be too much, and recover the excess of the payment afterwards.[6]

1086. A mortgagee cannot be compelled to assign the mortgage upon receiving payment of it; he can only be required to release or discharge it.[7] If the person who redeems is interested

[1] Gage *v.* Brewster, 31 N. Y. 218, reversing 30 Barb. 387; Moore *v.* Cord, 14 Wis. 213; Benedict *v.* Gilman, 4 Paige (N. Y.), 58; Vroom *v.* Ditmas, 4 Ib. 526.

[2] Bondurant *v.* Taylor, 3 G. Gr. (Iowa) 561.

[3] Miller *v.* Whittier, 36 Me. 577.

[4] Holbrook *v.* Worcester Bank, 2 Curtis, 244.

[5] Close *v.* Phipps, 7 M. & G. 586; Fraser *v.* Pendlebury, 10 W. R. 104; Cazenove *v.* Cutler, 4 Met. (Mass.) 246; and see Farwell *v.* Sturdivant, 37 Me. 308.

[6] McMillan *v.* Richards, 9 Cal. 365.

[7] See § 792; Lamb *v.* Montague, 112

in only a portion of the property, he becomes in equity an assignee of the mortgage for the purpose of compelling a contribution from those who own the other portions of the equity of redemption, without any formal transfer of the mortgage to him. He is subrogated to the rights of the mortgagee by operation of law. Having assumed for his own protection more than his share of the common burden, he is fully protected under this settled rule of equity, and without any act on the part of the mortgagee may enforce his equitable rights to contribution against the other parties in interest. He can call upon them to pay their shares of the incumbrance, or to be foreclosed of all right of redemption.[1]

In like manner when a junior mortgagor or other incumbrancer redeems from a prior mortgage, although he has no right to demand a written assignment of the mortgage, he has the right to have the mortgage delivered to him uncancelled, and this in equity is a complete assignment of it. Such redemption puts him in the place of the mortgagee, and gives him all the mortgagee's rights against the mortgagor.[2] He thereupon becomes entitled to hold it as an existing mortgage, until the owner redeems or he himself forecloses it.

1087. In New York, however, it is an established doctrine that a mortgagee may be compelled, upon payment of his mortgage, to make an assignment of it, when this will afford a more complete protection to the person who has paid the money, he not being primarily liable to pay it, but is, for instance, a surety or a junior incumbrancer.[3] This right to an assignment rests wholly upon the assumption that the person redeeming cannot otherwise be protected. In other courts protection is given in all cases upon the principle of subrogation by law. The mortgagee is not allowed to discharge the mortgage of record, but is required to deliver it, with the note or bond which accompanies it, to the

Mass. 352; Lamson *v.* Drake, 105 Mass. 564; Hamilton *v.* Dobbs, 19 N. J. Eq. 227; Bigelow *v.* Cassedy, 26 N. J. Eq. 557.

[1] Young *v.* Williams, 17 Conn. 393; Averill *v.* Taylor, 8 N. Y. 44; Brainard *v.* Cooper, 10 N. Y. 356; Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35; McLean *v.* Towle, 3 Sandf. (N. Y.) Ch. 119.

[2] Hamilton *v.* Dobbs, 19 N. J. Eq. 227.

[3] Johnson *v.* Zink, 52 Barb. (N. Y.) 396; Pardee *v.* Van Anken, 3 Ib. 534; Tompkins *v.* Seely, 29 Ib. 212; McLean *v.* Tompkins, 18 Abb. (N. Y.) Pr. 24; Jenkins *v.* Continental Ins. Co. 12 How. (N. Y.) Pr. 66; Dauchy *v.* Bennett, 7 Ib. 375; Ellsworth *v.* Lockwood, 42 N. Y. 89. See § 792.

person redeeming, who may enforce the obligations if necessary in the name of the mortgagee. An assignment of the mortgage and debt assumes a sale of them, which a mortgagee cannot be compelled to make. Subrogation, on the other hand, assumes the payment of the debt by one not liable primarily to pay it; but by paying it the law says that the person making the payment steps into the place and rights of the mortgagee who receives the payment. But to enable a subsequent mortgagee to compel an assignment to himself of a prior mortgage, there must be some equitable reason for it, and the mere fact that he is a subsequent mortgagee does not constitute such equitable reason.[1]

Application for an assignment may be made in the foreclosure proceedings, if such are pending, accompanied by an offer to pay whatever sum is due upon the mortgage and for costs.[2] If no such suit is pending, and the mortgagee declines a tender of the amount due, accompanied by a demand for an assignment, he may bring a bill to redeem in the usual form, except in asking for an assignment of the mortgage to himself instead of a discharge of it.[3]

1088. A tender made after breach of the condition, except in those states where the common law doctrine has been changed, does not reinvest the mortgagor with the legal estate;[4] and the effect of it generally is only to allow a suit to be brought for redemption within a certain time as provided by statute in several states, or to throw the costs of the suit upon the mortgagee in case the tender was of a sufficient amount to fully satisfy his claim.[5] Of course the acceptance of the whole sum tendered operates as a waiver of the foreclosure, and a restoration of the mortgagor's title.[6]

A tender, to be good, must be of the whole amount due.[7] It must be made to the mortgagee or his assignee.[8] If an assignment has been made but not recorded, it is the duty of the person who wishes to make a tender to seek out the assignee.[9] But

[1] Frost *v.* Yonkers Sav. Bank, 8 Hun (N. Y.), 26; Vandercook *v.* Cohoes Sav. Inst. 5 Hun (N. Y.), 641; 12 Ib. 641; Ellsworth *v.* Lockwood, 42 N. Y. 89.

[2] Hornby *v.* Cramer, 12 How. (N. Y.) Pr. 490.

[3] See Smith *v.* Green, 1 Coll. 555.

[4] See § **892**; Smith *v.* Anders, 21 Ala. 782; Patchin *v.* Pierce, 12 Wend. (N. Y.) 61.

[5] Lamson *v.* Drake, 105 Mass. 564, 568.

[6] Patchin *v.* Pierce, *supra.*

[7] Graham *v.* Linden, 50 N. Y. 547; Litt. §§ 334, 337.

[8] Dorkray *v.* Noble, 8 Me. 278.

[9] Mitchell *v.* Burnham, 44 Me. 286.

a tender to the legal holder of the mortgage of the whole amount due on it is good, although only a portion of it belongs to him, and the balance to some other person for whom he holds the mortgage in trust.[1]

A tender must be made unconditionally.[2] An offer to pay if the defendant "would reassign and transfer" to him is not sufficient;[3] nor is one conditioned upon the execution of a quitclaim deed in addition to a discharge.[4] As to the place of tender, if no place of payment is mentioned in the mortgage deed, and none has been agreed upon by the parties, the mortgagor must seek the mortgagee and make a personal tender.[5] The mortgagee should be sought at his place of business, though under many circumstances a tender at his house is proper.[6]

A tender of bank notes or bills which are not made a legal tender is sufficient, if not objected to on that account;[7] and in like manner a tender of a larger sum than is due, whereby the creditor is obliged to make change or to return a part, is good if no objection is made.[8] The money should be actually produced, for though the creditor may refuse at first, the sight of the money, it is said, may tempt him to take it.[9] But this may be waived by the mortgagee, as by requesting the mortgagor not to trouble himself to go to another part of the house for it;[10] or by refusing to look at it.[11] A tender of money in bags is good, if the money is actually contained in them;[12] and so of notes twisted in a roll.[13] A mistake in the value of a coin included in the tender may be relieved against.[14]

[1] Cliff *v.* Wadsworth, 2 Y. & C. C. C. 598; Graham *v.* Linden, 50 N. Y. 547.

[2] Evans *v.* Judkins, 4 Camp. 156; Glasscott *v.* Day, 5 Esp. 48; Cole *v.* Blake, Peake, 179; Loring *v.* Cooke, 3 Pick. (Mass.) 48. See § 900.

[3] Ferguson *v.* Wagner, 41 Ind. 450; Wendell *v.* New Hampshire Bank, 9 N. H. 404.

[4] Dodge *v.* Brewer, 31 Mich. 227.

[5] See § 897; Gyles *v.* Hall, 2 P. Wms. 378; Sharpnell *v.* Blake, 2 Eq. Cas. Abr. 604.

[6] Manning *v.* Burger, 1 Ch. Ca. 28.

[7] Austen *v.* Dodwell, 1 Eq. Ca. Abr. 318; Lockyer *v.* Jones, Peake, 180, n.; Biddulph *v.* St. John, 2 Sch. & Lef. 521; Fellows *v.* Dow, 58 N. H. 21.

[8] Black *v.* Smith, Peake, 88. See § 901.

[9] Douglas *v.* Patrick, 3 T. R. 683; Thomas *v.* Evans, 10 East, 101; Dickinson *v.* Shee, 4 Esp. 67.

[10] Douglas *v.* Patrick, *supra;* Harding *v.* Davies, 2 Car. & P. 77.

[11] Fellows *v.* Dow, *supra.*

[12] Wadis's case, 5 Rep. 115 *a.* See conflicting case, Sucklinge *v.* Coney, Noy, 74.

[13] Alexander *v.* Brown, 1 Car. & P. 288. For tenders held bad, see Harding *v.* Davies, 2 Car. & P. 77; Leatherdale *v.* Sweepstone, 3 Ib. 342; Glasscott *v.* Day, 5 Esp. 48; Thomas *v.* Evans, 10 East, 101.

[14] Abbott *v.* Banfield, 43 N. H. 152.

The tender must be made at a proper time. If a certain hour be fixed for the payment of the money, the mortgagor's attendance at any time before the beginning of the next hour is sufficient. In a case where the hour was fixed at three o'clock, and the mortgagor attended before four o'clock to make payment, he was not bound to pay interest afterwards, although the mortgagee had waited from a quarter before three till a quarter after that hour.[1]

If the mortgagor requests the rendering of an account of the amount due, the request must be so made in respect to time and place as to give the mortgagee an opportunity to render an account.[2] A request made upon the mortgagee when absent from home in another town, and a reply by him that he would give all the information in his power if the mortgagor would call upon him at home, do not amount to a demand for an account and a refusal to render it.[3]

When on the day before the expiration of the time for redeeming land from a mortgage, a person in behalf of the mortgagor called upon the mortgagee and asked him to execute a quitclaim deed and receive the money due on the mortgage, but he declined to do so, and said he wished to see the mortgagor, whom he would meet in two days, and then would take no advantage of the expiration of the time, it was held that the tender was sufficient to entitle the mortgagor to redeem if the tender was made by his authority.[4] Oral authority from the mortgagor, or a subsequent ratification by him, is sufficient.[5]

6. *Contribution to redeem.*

1089. In general. — When the estates of two persons are subject to a common mortgage, which one of them pays for the benefit of both, he has a right to hold the whole estate thus redeemed, until the other party shall pay an equitable proportion of the sum paid to redeem; or the party who has paid the incumbrance may in equity enforce contribution from the other.[6] But to entitle one to contribution from the other, their equities must

[1] See § 898; Knox *v.* Simmonds, 4 Bro. C. C. 433.

[2] Willard *v.* Fiske, 2 Pick. (Mass.) 540; Putnam *v.* Putnam, 13 Ib. 129.

[3] Fay *v.* Valentine, 2 Pick. (Mass.) 546.

[4] Walden *v.* Brown, 12 Gray (Mass.), 102.

[5] Walden *v.* Brown, *supra.*

[6] Chase *v.* Woodbury, 6 Cush. (Mass.) 143.

be equal. If there was any obligation resting upon the person who paid the incumbrance to discharge it as a debt of his own, he can of course claim nothing from the other, although the latter was benefited by the payment; and on the other hand, if it was the duty of latter to pay the whole incumbrance, the payment of it by the former gives him, not a right to contribution, but a right to hold the mortgage as a subsisting security against the other part-owner; in other words, he is subrogated to the position of the mortgagee. The right of subrogation has already been spoken of, and it remains to be considered under what circumstances the right to contribution arises.

The test by which the right to contribution is always determined is found in the inquiry whether the equities of the parties are equal: if they are equal the right to contribution exists; but if they are not equal it does not exist. A mortgagor who has sold a portion of the land covered by the mortgage by a warranty deed cannot claim contribution of the purchaser, because he is himself liable for the whole debt. Neither can a subsequent purchaser call upon a prior one for contribution, because such subsequent purchaser acquires only the rights the mortgagor then had, and therefore the equities of the two purchasers are not equal.[1]

When a mortgage is foreclosed by a suit in equity or an equitable suit under the codes adopted in many states, the equities of purchasers of portions of the mortgaged estate are protected by a direction in the decree of sale that the parcels be sold in the inverse order of alienation. Where the foreclosure is effected in other ways, as, for instance, by sale under a power, by entry and possession, by a writ of entry or other suit at law, the remedy of one whose estate is not primarily liable for the satisfaction of the mortgage is to redeem it, and then enforce it against that part of the mortgaged premises which in equity should bear the burden.

1090. The general rule, therefore, as to contribution is, that where the estates of two or more persons are subject to one common incumbrance, which one pays for the benefit of all, he is entitled to hold the whole estate which he has thus redeemed until the others pay their proportionate and equitable share of the sum so paid for the common benefit of all.[2] But to entitle the several

[1] Kilborn *v.* Robbins, 8 Allen (Mass.), 466.

[2] Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Allen *v.* Clark, 17 Ib. 47, per Wilde,

owners to a *pro rata* contribution they must stand upon the same equal ground. If a mortgagor convey the mortgaged land in seperate parcels by warranty deeds, and afterwards pay the mortgage debt, he is not entitled to contribution from the purchasers, because he has merely paid his own debt, which his covenants bound him to pay. And so any one purchasing a part, while the mortgagor himself remains owner of another part, has the right to have the part so remaining in his grantor first applied to satisfy the incumbrance. The heir of the mortgagor is under the same obligation. In Harbert's case it is said that if one is seised of three acres under an incumbrance, and enfeoffs A. of one acre, and B. of another, and the third acre descends to the heir, who discharges the incumbrance, he shall not have contribution, "for he sits in the seat of his ancestor." [1]

If the owner make simultaneous deeds of undivided moieties of the incumbered estate, the grantees stand upon an equal footing in relation to the incumbrance.[2]

But if one of these grantees neglect to put his deed upon record, and the other grantee, after recording his deed, sells his moiety to one who has no notice of the conveyance of the other's moiety, this last purchaser stands in the same position as if the other moiety still remained in the original owner, as in fact the record indicates; and therefore such purchaser has the right to have the moiety so remaining first applied to satisfy the incumbrance. The grantee who fails to put his deed on record enables the other grantee to make an apparently good title to the third person purchasing without notice of the incumbrance of the simultaneous deed.[3]

Where several persons own distinct parcels of the mortgaged premises, contribution should be made in proportion to the present value of the several parcels, unaffected by improvements made by either of them.[4]

J. "The foundation of contribution is a principle of justice and equity; and when there is equal equity, and there is an incumbrance on land belonging to different parties, they ought each to contribute towards removing it."

[1] 3 Co. 11 *b*.

[2] See Adams *v.* Smilie, 50 Vt. 1.

[3] Chase *v.* Woodbury, 6 Cush. (Mass.) 143.

[4] Bailey *v.* Myrick, 50 Me. 171; Taylor *v.* Bassett, 3 N. H. 294; Aiken *v.* Gale, 37 N. H. 501; Sawyer *v.* Lyon, 10 Johns. (N. Y.) 32; Stevens *v.* Cooper, 1 Johns. (N. Y.) Ch. 425; Johnson *v.* White, 11 Barb. (N. Y.) 194; Bates *v.* Ruddick, 2 Iowa, 423; Beall *v.* Barclay, 10 B. Mon. (Ky.) 261.

1091. If a mortgagor sells portions of the mortgaged premises in different parcels at different times by warranty deed, that which he retains is in equity primarily liable as against all but the mortgagee for the whole debt, and such grantee is not required to contribute.[1] As between such purchaser and vendor it is well settled by all the decisions, both American and English, that the purchaser may redeem the mortgage, and enforce it against that portion of the estate still remaining in the hands of the mortgagor.[2] A person having an agreement for purchase, such that he could enforce a specific performance of it in equity, has the same right as an actual purchaser to charge the burden of the incumbrance upon the part of the estate retained by the mortgagor.[3]

The mortgagee may generally enforce his security against the whole mortgaged premises; but if he become the owner of the equity of redemption of the part chargeable with the whole amount of the mortgage, he is required in equity to satisfy his mortgage so far as possible out of that part. Therefore, the purchaser by warranty deed of a portion of premises covered by a mortgage may redeem without contribution against a subsequent assignee of the mortgage, when such assignee has also subsequently become the owner of the equity of redemption of the remaining portion of the land, and that is sufficient to satisfy the mortgage debt. The deed of warranty exempts the land described in it from contribution in favor of the mortgagor or any person claiming the remaining land under him, with notice of the prior conveyance.[4]

1092. Portions of the mortgaged premises sold to different persons are chargeable in the inverse order of the conveyances.[5] Upon a decree of foreclosure in such case the portion, if any, still remaining in the hands of the mortgagor is first subjected to sale; and then the portion last conveyed by him, and so on in the inverse order of the conveyances made by him. This rule is considered in a subsequent chapter, and the authorities are collected.[6]

[1] Wallace *v.* Stevens, 64 Me. 225.

[2] Cheever *v.* Fair, 5 Cal. 337; 2 Story's Eq. § 1233.

[3] Root *v.* Collins, 43 Vt. 173.

[4] Bradley *v.* George, 2 Allen (Mass.), 392.

[5] Lyman *v.* Lyman, 32 Vt. 79; Root *v.* Collins, 34 Vt. 173; Gill *v.* Lyon, 1 Johns. (N. Y.) Ch. 447; Clowes *v.* Dickenson, 5 Johns. (N. Y.) Ch. 235; S. C. 9 Cow. 403; Skeel *v.* Spraker, 8 Paige (N. Y.), 182; Stuyvesant *v.* Hall, 2 Barb. (N. Y.) Ch. 151.

[6] Chapter xxxvi; §§ **1620–1632.**

Under the system of registry in general use in this country, this rule seems reasonable and just, as those acquiring a subsequent interest in the estate have notice of the condition of it when they take it; but the record is not, in general, notice to a prior purchaser.[1] The want of a general registry system in England is undoubtedly the reason why this rule has not been fully adopted there.

But notice of the equities of prior purchasers may be given in other ways than by the registry. A purchaser of a portion of a lot of land, the whole of which is subject to a prior mortgage, having notice of a prior unrecorded deed of warranty of an adjoining portion of the same lot to a third person, cannot compel the latter to contribute. A reference in the mortgage deed to such owner of the adjoining lot amounts to notice of the conveyance.[2]

As between purchasers in succession of different parts of the equity of redemption of lands there is no contribution, as the parties do not stand on an equal footing in equity.[3]

7. *Pleadings and Practice on Bills to redeem.*

1093. In general. — The only remedy of the mortgagor for enforcing his right to redeem after a breach of the condition is by a bill in equity. If the mortgagee is in possession, he has the right to retain the possession until his claim upon the property is paid. So long as the mortgage is in fact not discharged, and is apparently a subsisting security, the mortgagor cannot obtain possession by ejectment.[4] The rule is the same although the mortgagor claims that the debt has been paid in full. So long as the mortgage is apparently unsatisfied, and the mortgagee claims any interest under it, the mortgagor must resort to a suit in equity to redeem; and although he may allege that the mortgage has been paid, or was given for the accommodation of the mortgagee, and may pray that a decree be entered that it be discharged, yet he should at the same time pray that he be allowed to redeem, and should offer to do so if anything be found

[1] Beard *v.* Fitzgerald, 105 Mass. 134.

[2] George *v.* Kent, 7 Allen (Mass.), 16.

[3] Gill *v.* Lyon, 1 Johns. (N. Y.) Ch. 447; Clowes *v.* Dickenson, 5 Johns. (N. Y.) Ch. 240.

[4] See § 1093; Chase *v.* Peck, 21 N. Y. 581; Pell *v.* Ulmar, 18 N. Y. 139; Van Duyne *v.* Thayre, 18 Wend. (N. Y.) 233; Phyfe *v.* Riley, 15 Ib. 248; Woods *v.* Woods, 66 Me. 65.

due upon the mortgage.[1] Although the mortgagor is already in the actual possession of the mortgaged estate, he may, after a breach of the condition and payment of the mortgage, or a tender of payment, maintain a bill to redeem, for in legal contemplation his possession is considered that of the mortgagee.[2]

When the condition of the mortgage has been saved by performance of it before any breach has occurred, and the mortgagee being in possession refuses to surrender it, the mortgagor cannot maintain a bill in equity to recover possession, because he then has a complete and adequate remedy at law.[3]

One who has the right to redeem cannot maintain a bill for this purpose after a suit has been brought against him for the foreclosure of the mortgage; nor can he enjoin the prosecution of the foreclosure suit, although he at the same time offers to redeem.[4]

1094. The bill should conform to the general principles of equity pleading and practice, as modified by the statutes and rules adopted in the state where the action is brought. It should pray for an accounting of what is due upon the mortgage, and where the mortgagee has been in receipt of rents and profits, for an accounting of these, and that the defendant be adjudged to deliver up the possession of the estate upon payment of the amount found due. A bill which also asks for the correction of accounts already exchanged between the parties is not open to the objection of being multifarious, inasmuch as the accounts relate to the mortgage debt, and the correction asked for is only a different mode of asking for relief by a true account stated.[5]

The plaintiff's bill should contain sufficient averments to meet the case he wishes to make out, and should ask for all the remedy he is entitled to or wishes to obtain. If the mortgagee has been in possession and has received rents and profits, the bill should so allege, and should pray to have an account of them taken, otherwise no deduction will be made upon the mortgage debt on account of such rents and profits.[6]

A bill in equity by a tenant for life prayed that he might be

[1] Hill *v.* Payson, 3 Mass. 559; Parsons *v.* Welles, 17 Mass. 419; Newton *v.* Baker, 125 Mass. 30; Beach *v.* Cooke, 28 N. Y. 508. See, however, Farmers' F. Ins. & Loan Co. *v.* Edwards, 21 Wend. (N. Y.) 467; S. C. 26 Ib. 540.

[2] Hicks *v.* Bingham, 11 Mass. 300.

[3] Holman *v.* Bailey, 3 Met. (Mass.) 55.

[4] Kilborn *v.* Robbins, 8 Allen (Mass.), 466.

[5] Greene *v.* Harris, 10 R. I. 382.

[6] Cree *v.* Lord, 25 Vt. 498.

permitted to hold possession of the mortgaged premises upon paying the interest as it might accrue, and that upon paying the whole amount due upon the mortgage, the mortgagee might be compelled to assign it to him. But as a bill for these purposes is not allowed, it was nevertheless maintained as a bill to redeem simply; inasmuch as it contained an averment that the plaintiff was ready and offered to pay the full amount due on the mortgage, upon an assignment of it to himself, "or in such other way and upon such other terms" as to the court should seem meet; and although the bill did not pray for an account, it alleged that an account had been previously demanded, and prayed for full answers to the bill, and the answer alleged the defendant's readiness to account.[1]

1095. The bill to redeem must make a tender of the amount the plaintiff concedes to be due on the mortgage debt, or must offer to pay whatever may be found to be due.[2] If the bill be brought on the ground of a tender made and refused, the tender should be followed up by a payment into court, at the time of filing the bill, which should contain a proper averment of a compliance with this requirement, otherwise it will be without equity.[3] The mere payment of the money into court, not made upon any tender averred in the bill and proved by evidence, does not amount to a tender, and does not affect the case.[4] A suggestion of the plaintiff's poverty and inability to redeem, for which reason he asks for a sale of the premises, does not excuse the omission of an offer to redeem.[5]

Either an allegation of tender or an offer to pay is a necessary part of the bill, and the omission is ground for a demurrer.[6] But

[1] Lamson *v.* Drake, 105 Mass. 564.

[2] Harding *v.* Pingey, 10 Jur. N. S. 872; Dayton *v.* Hayter, 7 Beav. 319; Tasker *v.* Small, 3 Myl. & Cr. 63; Perry *v.* Carr, 41 N. H. 371; Kemp *v.* Mitchell, 36 Ind. 249; Silsbee *v.* Smith, 60 Barb. (N. Y.) 372; S. C. 41 How. Pr. 418; Beekman *v.* Frost, 18 Johns. (N. Y.) 544; 1 Johns. Ch. 288; Miner *v.* Beekman, 11 Abb. (N. Y.) Pr. N. S. 147, 163; Crews *v.* Threadgill, 35 Ala. 334; Anson *v.* Anson, 20 Iowa, 55; Hoopes *v.* Bailey, 28 Miss. 328; Coombs *v.* Carr, 55 Ind. 303.

[3] Daughdrill *v.* Sweeney, 41 Ala. 310. As to what is a sufficient averment of tender and offer to redeem, see Edgerton *v.* McRea, 6 Miss. (5 How.) 183; Lanning *v.* Smith, 1 Pars. (Pa.) Sel. Cas. 13; Barton *v.* May, 3 Sandf. (N. Y.) Ch. 450; Quin *v.* Brittain, Hoff. (N. Y.) Ch. 353.

[4] Hart *v.* Goldsmith, 1 Allen (Mass.), 145.

[5] Goldsmith *v.* Osborne, 1 Edw. (N. Y.) 560.

[6] Allerton *v.* Belden, 49 N. Y. 373; Silsbee *v.* Smith, 60 Barb. (N. Y.) 372; 41 How. Pr. 418.

although no objection be taken to this omission, relief will be granted only upon condition of payment of what is justly due.[1] Where the mortgagee fraudulently prevented the plaintiff from seasonably redeeming, and neglected to render, upon request, an account of the amount due, the failure of the plaintiff to tender or bring into court the amount due was held to be no ground for dismissing the bill; but a decree was ordered that on payment within a fixed time the defendant should release the mortgage.[2]

In like manner tender of the debt should be made in a bill to have an absolute deed declared a mortgage; but when the fact of the loan is established, the omission will only affect the matter of costs.[3]

1096. After payment in full. — If the mortgage has been paid, or if the mortgagee has received rents and profits from the estate sufficient to pay both the principal and interest of the mortgage debt, a tender or offer in the bill to pay whatever may be due is no longer necessary; but the bill should in that case allege the payment of the mortgage, and demand an accounting by the mortgagee. Upon the refusal of the mortgagee to account, and proof that the mortgage is paid, the plaintiff is entitled to a judgment for possession of the premises.[4] The suit in such case is really one to compel a discharge of the mortgage.[5]

1097. The parties. — As a general rule, all persons who have an interest in the mortgage or in the equity of redemption, which interest is apparent of record or known to the plaintiff, should be made parties to the suit.[6] The plaintiff must have some interest in the equity of redemption, and if there are also others interested in it he must make them parties to the suit, generally as defendants. He must also make defendants all persons who appear to be interested in the mortgage security. Objection that persons who are necessary parties have not been brought before the court may be taken by answer.[7]

1098. Proper parties plaintiff. — Any one who has a right to

[1] Schermerhorn *v.* Talman, 14 N. Y. 93.

[2] Watkins *v.* Watkins, 57 N. H. 462.

[3] Marvin *v.* Prentice, 49 How. (N. Y.) Pr. 385.

[4] Quin *v.* Brittain, Hoff. (N. Y.) Ch. 353; Calkins *v.* Isbell, 20 N. Y. 147; Barton *v.* May, 3 Sandf. (N. Y.) Ch. 450.

[5] Beach *v.* Cooke, 28 N. Y. 508; 39 Barb. 360.

[6] Calvert on Parties, 13, 91; Evans *v.* Jones, Kay, 39.

[7] Winslow *v.* Clark, 47 N. Y. 261; Dias *v.* Merle, 4 Paige (N. Y.), 259.

redeem is a proper party plaintiff. Upon the death of one having an interest in fee in the land his heirs or devisees are the proper parties.[1] If part of the mortgage has been paid in the lifetime of the mortgagor, and an account is to be taken of the amount due on the mortgage, the personal representatives of the mortgagor should be joined with the heir or devisee as parties plaintiff; or in case of their refusal to join in the bill they should be made defendants.[2] If the mortgage be of a term of years only, this being a personal interest, then only the personal representatives of the mortgagor need be made parties plaintiff.[3]

A wife, in a bill to redeem her own land, need not join her husband.[4] If the equity of redemption has been conveyed, subject to the mortgage, to different persons, or if others have in any way become interested in it, upon redemption by the owner of one part of it, he should join all others having an interest in it as defendants, because they are all interested in the rendering of the mortgagee's account.[5] The interest of the others should appear from the allegations of the bill.[6] If the mortgagor has conveyed the equity of redemption by warranty deed, so that he is liable to discharge the mortgage, the mortgagor should be made a party, so that he may assist in taking the account and be bound by the decree.[7] If in such case the mortgagor claims that the mortgage is paid, but the holder of it claims that something is still due upon it, the purchaser may properly bring both of them before the court upon a bill to redeem.[8]

1099. Heir of mortgagor. — Although upon the death of the mortgagor or other owner of the equity of redemption, his heir or devisee should bring the suit to redeem;[9] yet where the suit was brought by the administrator, and it was for the first time objected at the hearing that the heirs should have been joined, it was held that as the heirs were not prejudiced, and the adminis-

[1] Story's Eq. Pl. § 182; Duncombe *v.* Hansley, 3 P. W. 333, n.; Sutherland *v.* Rose, 47 Barb. (N. Y.) 144.

[2] 5 Waite's Prac. 285; Cholmondeley *v.* Clinton, 2 Jac. & W. 135; Rylands *v.* La Touche, 2 Bligh, 566.

[3] Story's Eq. Pl. § 182; Sutherland *v.* Rose, *supra*; Wilton *v.* Jones, 2 Y. & C. C. C. 244.

[4] Hilton *v.* Lothrop, 46 Me. 297.

[5] Story's Eq. Pl. § 183; McCabe *v.* Bellows, 1 Allen (Mass.), 269.

[6] Lovell *v.* Farrington, 50 Me. 239.

[7] Story's Eq. Pl. § 183.

[8] Wandle *v.* Turney, 5 Duer (N. Y.), 661.

[9] Sutherland *v.* Rose, *supra*; Elliot *v.* Patton, 4 Yerg. (Tenn.) 10; Smith *v.* Manning, 9 Mass. 422; Putnam *v.* Putnam, 4 Pick. (Mass.) 139.

trator's interest entitled him to redeem, the decree in his favor should be affirmed.[1] In case the mortgage be of a leasehold estate merely, the personal representatives of the deceased mortgagor are the proper parties.[2]

In Massachusetts it is provided by statute that upon the death of the person entitled to redeem without having made a tender for that purpose, his executor or administrators, as well as his heirs or devisees, may make the tender, and commence and prosecute the suit; or they may commence and prosecute a suit founded upon a tender made by the deceased in his lifetime, or they may prosecute a suit begun by him.[3]

As a general rule, trustees who hold the equity of redemption are the proper parties to file a bill to redeem.[4] Assignees or trustees of the equity of redemption for the benefit of creditors may maintain an action to redeem without joining the creditors.[5] In case such assignees or trustees neglect or refuse to act, or are in collusion with the mortgagee, then the creditors, or one for the benefit of all, may bring the action, and join the trustees or assignees as defendants.[6]

A mortgagor who has conveyed his equity of redemption absolutely,[7] or whose right in equity has been sold on execution,[8] or assigned in bankruptcy,[9] need not be made a party to the suit to redeem.

1100. The parties defendant to a bill to redeem should be all persons legally or beneficially interested under the mortgage. If there be no outstanding interest under the mortgagee, he is the only necessary party. If he be dead, the heirs at law or devisees in whom the legal estate is vested must be made parties; and the personal representative of the mortgagee should at the same time be made a party, because he is entitled to recover the money paid.[10]

[1] Enos *v.* Sutherland, 11 Mich. 538; Guthrie *v.* Sorrell, 6 Ired. (N. C.) Eq. 13.

[2] Story's Eq. Pl. § 170.

[3] Gen. Stat. of Mass. 1860, c. 140, §§ 32, 33.

[4] Dexter *v.* Arnold, 1 Sumn. 109.

[5] Story's Eq. Pl. § 184; Waite's Prac. 286; Hanson *v.* Preston, 3 Y. & C. 229; Cash *v.* Belcher, 1 Hare, 310; Hill *v.* Edmonds, 5 De G. & S. 603.

[6] Troughton *v.* Binkes, 6 Ves. 573; Holland *v.* Baker, 3 Hare, 68.

[7] Hilton *v.* Lothrop, 46 Me. 297; see, however, Clark *v.* Long, 4 Rand. (Va.) 451.

[8] Thorpe *v.* Ricks, 1 Dev. & B. (N. C.) Eq. 613.

[9] Kerrick *v.* Saffery, 7 Sim. 317; Lloyd *v.* Lander, 5 Mad. 282; Jones *v.* Birms, 33 Beav. 362; Metropolitan Bank *v.* Offord, L. R. 10 Eq. 398.

[10] Story's Eq. Plead. § 188; Hilton *v.* Lothrop, 46 Me. 297.

The person who is the legal holder of the mortgage at the time the action is brought is always a necessary party, whether he be mortgagee or assignee of the mortgage;[1] and all holders of the mortgage who have been in possession of the estate, and have received rents and profits, should be made parties for the purpose of taking the account. Except in such case, the holders of the mortgage prior to the holder at the time of the commencement of the suit, who have no longer any interest in the security, are not necessary parties to it.[2]

All the mortgagees or assignees of it, in whom the legal title is vested, are necessary parties.[3]

When redemption is sought by one who was not made a party to a foreclosure suit, and whose rights were in consequence not barred by it, he should not join with the purchaser as defendant any one who was made a party to the foreclosure suit, and whose rights are extinguished.[4]

The mortgagee is the only necessary party when no one else is interested under him in the mortgage. If he has assigned his mortgage as collateral security, or has assigned a part interest only in the mortgage, he is still a necessary party, as also is his assignee.[5] If he has made an absolute conveyance of the estate as security, his grantee must be joined with him.[6] Even after any absolute assignment by the mortgagee, though no longer a necessary party,[7] he may properly be joined as a defendant, especially if it appears that he is in any way interested in taking the account.[8] But an assignee of the mortgage who has not become liable for the debt, and who has not become accountable for rents and profits, should not be made a party to the bill, unless he is charged with fraud or collusion, or a discovery is sought from him.[9] If he has assigned his mortgage, or conveyed his in-

[1] Yelverton *v.* Shelden, 2 Sandf. (N Y.) Ch. 481.

[2] Whitney *v.* McKinney, 7 Johns. (N. Y.) Ch. 144.

[3] Woodward *v.* Wood, 19 Ala. 213.

[4] 5 Wait's Prac. 286.

[5] Norrish *v.* Marshall, 5 Mad. 475; Hobart *v.* Abbot, 2 P. Wms. 643; Winslow *v.* Clark, 47 N. Y. 261; Dias *v.* Merle, 4 Paige (N. Y.), 259; Davis *v.* Duffie, 8 Bosw. (N. Y.) 617; 4 Abb. Pr. N. S. 478.

[6] Winslow *v.* Clark, 47 N. Y. 261; Dias *v.* Merle, 4 Paige (N. Y.), 259; Davis *v.* Duffie, 18 Abb. (N. Y.) Pr. 360; Brown *v.* Johnson, 53 Me. 246.

[7] Beals *v.* Cobb, 51 Me. 348.

[8] Doody *v.* Pierce, 9 Allen (Mass.), 141; Wing *v.* Davis, 7 Me. 31; Whitney *v.* McKinney, 7 Johns. (N. Y.) Ch. 144.

[9] Williams *v.* Smith, 49 Me. 564.

terest in the land upon trusts declared, the trustee and the *cestui que trust* as well should be made parties to the action.[1]

One who has purchased under a defective foreclosure sale is in effect an assignee of the mortgage, and as such he must be made a party to the suit. If he has granted portions of the property to others, they thereby become assignees of a part of the mortgage in proportion to the value of their respective purchases; and upon redemption the money paid must be divided in proportion to the purchase money paid by each, and in the order of the purchases.[2]

1101. Upon the death of a mortgagee of an estate in fee, according to the English rule, his heir or devisee must be made a party, because the legal estate is in him; and the personal representative must also be made a party, because he is generally entitled to the money when it is paid.[3] If the mortgage be of a leasehold estate, the personal representative only of the mortgagee without the heir should be made defendant, because he alone is interested in the term.[4] In those states where the common law doctrine that the legal estate is in the mortgagee has given place to the doctrine that he has only a lien for the security of his claim without any legal estate, the mortgagee's administrator is the only necessary party in such case.[5]

Where the heirs at law of the mortgagee entered upon the land and took all the needful steps to foreclose if they had been entitled to foreclose, and held open and peaceable possession for more than eight years, when an administrator was first appointed upon the petition of the mortgagor, who thereupon filed a bill in equity to redeem, it was held that he was entitled to redeem, and to an account of the rents and profits wrongfully received by the heirs. The heirs having entered under the mortgage, and having alleged a foreclosure in their answer, cannot shield themselves from accountability by saying that they occupied as mere strangers and disseisors. The administrator is properly made a party because he is the person to whom the balance is to be paid by the plaintiff. The heirs being in effect executors in their own wrong are

[1] Wetherell *v.* Collins, 3 Mad. 255; Drew *v.* Harman, 5 Price, 319; Whistler *v.* Webb, Bunb. 53.

[2] Davis *v.* Duffie, 8 Bosw. (N. Y.) 617; aff'd 3 Keyes, 606; 4 Abb. Pr. N. S. 478.

[3] Story's Eq. Pl. § 188; Anon. 2 Freem. 52.

[4] Osbourn *v.* Fallows, 1 Russ. & M. 741.

[5] Copeland *v.* Yoakum, 38 Mo. 349.

interested in the account and therefore are proper parties to the bill.[1]

1102. When a junior mortgagee seeks to redeem he must make the mortgagor or other representative of the realty a party, and the prior mortgagees as well. Though the object be merely to redeem a prior mortgage, the owner of the equity of redemption is a necessary party, because a court of equity always seeks to determine the rights of all parties interested in the estate; and to do this in such case the decree should be that the second mortgagee redeem the first mortgage, and that the owner of the equity of redemption redeem the second mortgagee or stand foreclosed. If the owner of the equity of redemption be not made a party, his right to redeem remains open, and the first mortgagee may be exposed to another suit.[2] If the junior mortgagee is unable to foreclose his mortgage, for the reason that it is not due or for other cause, then he cannot redeem a prior mortgage against the consent of the holder of it; for in such case he cannot bring the mortgagor before the court for the purpose of completing his remedy by foreclosure, and he cannot compel the mortgagee to assign to him.[3] Of course he may, at a foreclosure sale by the prior mortgagee, buy the estate; and it is said that the court may restrain the prior mortgagee from making a sudden sale for the purpose of preventing a redemption or purchase by the junior mortgagee.[4]

The first mortgagee, after having filed a bill of foreclosure, is not justified in refusing a tender of the principal and interest due him, and in insisting upon being redeemed only by the ordinary suit in court.[5]

When a subsequent mortgagee of a part of the estate comprised in the first mortgage redeems, he must make the owners of all parts of that estate parties to his suit,[6] for the prior mortgage must be redeemed entirely or not at all; and if the owner of the equity of redemption of any part of that estate is not brought before the court, the mortgagee may be subjected to another suit.

[1] Haskins *v.* Hawkes, 108 Mass. 379.

[2] Story's Eq. Pl. § 186, and cases cited; Fell *v.* Brown, 2 Bro. C. C. 276; Palk *v.* Clinton, 12 Ves. 48; Farmer *v.* Curtis, 2 Sim. 466; Caddick *v.* Cook, 32 Beav. 70; 9 Jur. N. S. 454; 32 L. J. N. S. Ch. 769.

[3] Ramsbottom *v.* Wallis, 5 L. J. Ch. N. S. 92; Rhodes *v.* Buckland, 16 Beav. 212.

[4] Rhodes *v.* Buckland, *supra.*

[5] Smith *v.* Green, 1 Coll. 555.

[6] Palk *v.* Clinton, 12 Ves. 48; Peto *v.* Hammond, 29 Beav. 91; Thorneycroft *v.* Crockett, 2 H. L. C. 239.

1103. A person to whom the mortgage note has been transferred without an assignment of the mortgage has an equitable interest in the mortgage, and should be made a party to the bill.[1]

It would seem that in a bill to redeem where a mortgagee has indirectly become the purchaser at a sale under a power in the mortgage, which gave him no right to purchase, and the property sold for a less sum than the mortgage debt, the bill proceeding on the ground that the purchase from his grantee was not a *bonâ fide* purchase, the mortgagee should be made a party to the bill, because he apparently retained the original debt to which the mortgage is incident.[2]

A mortgagee who has assigned his mortgage and note as collateral security for his own debt must be made a party to a bill to redeem, as well as the person who received such assignment.[3]

1104. Reference to state account. — Where the mortgagee has been in possession and an account of the rents and profits is demanded, the usual practice is to order a reference to a master to state an account. The reference generally embraces not only an accounting of the rents and profits, but also of the amount due on the mortgage. Even when the mortgagee has not received the rents and profits a reference may be had, especially upon a default, to determine the amount due on the mortgage.[4] The case may be sent to a master to take evidence and state an account after it has been set down for hearing on the bill and answer.[5] If there be a conflict of testimony as to the amount that has been paid upon the mortgage the court will not determine it, but will refer the case to a master.[6]

After the plaintiff by his bill has admitted that a certain sum is due on the mortgage, the defendant claiming a larger sum, the master cannot report that nothing is due.[7]

1105. Defences. — The consideration of the mortgage cannot be inquired into unless the plaintiff lays the foundation for the inquiry by proper averments in the bill.[8] On the other hand, as a general thing it is wholly immaterial to the mortgagee in what

[1] Stone *v.* Locke, 46 Me. 445.
[2] Burns *v.* Thayer, 115 Mass. 89.
[3] Brown *v.* Johnson, 53 Me. 246.
[4] Doody *v.* Pierce, 9 Allen (Mass.), 141; 5 Wait's Prac. 288.
[5] Doody *v.* Pierce, *supra.*
[6] Bartlett *v.* Fellows, 47 Me. 53; Jewett *v.* Guild, 42 Me. 246.
[7] Bellows *v.* Stone, 18 N. H. 465.
[8] Dexter *v.* Arnold, 2 Sumn. 108.

manner, for what object, or what consideration, the owner of the equity of redemption acquired his title.[1] The mortgagee cannot defend upon the ground that plaintiff is not the real owner of the equity of redemption; that the money for the purchase of the property was furnished by another person, as, for instance, the husband, where the wife was the apparent owner and the plaintiff in the suit to redeem.[2]

A first mortgagee cannot defend a bill brought by a subsequent mortgagee upon the ground that the mortgage was fraudulent as against the mortgagor's creditors. But he may show that such mortgage was never delivered, and is therefore not a valid conveyance between the parties to it.[3]

If the plaintiff has an equitable right to redeem, it is no defence that he has verbally contracted to sell the land.[4] If the mortgagor in his bill to redeem alleges payment of the mortgage prior to the mortgagee's entry upon the land, fifteen years before, the burden of proving payment is upon him, and if he does not sustain it the bill is dismissed with costs.[5]

After an express waiver by the defendant in his answer of all objection to the plaintiff's redeeming upon payment of all sums found due, he cannot afterwards insist that the mortgage had been foreclosed before the bringing of the suit.[6] In a bill to redeem by the mortgagor, he may set up the reservation of usurious interest on the mortgage debt, and is entitled to the statute penalty for usury in reduction of the sum payable on the mortgage.[7] And so also in a writ of entry by the mortgagee to foreclose, the mortgagor may avail himself of usury as a defence and in reduction of the amount for which conditional judgment shall be entered;[8] but no deduction is to be made for usury paid under a verbal agreement not incorporated in the written contract.[9] After a usurious debt has been settled, by the mortgagee's taking the property mortgaged to secure it in satisfaction of it, the transaction will not be opened, and redemption allowed on account of

[1] Beach *v.* Cooke, 28 N. Y. 508; 39 Barb. (N. Y.) 360.

[2] Green *v.* Dixon, 9 Wis. 532.

[3] Powers *v.* Russell, 13 Pick. (Mass.) 69.

[4] Patterson *v.* Yeaton, 47 Me. 308.

[5] Furlong *v.* Randall, 46 Me. 79.

[6] Strong *v.* Blanchard, 4 Allen (Mass.), 538.

[7] Hart *v.* Goldsmith, 1 Allen (Mass.), 145; Smith *v.* Robinson, 10 Allen (Mass.), 130; Gerrish *v.* Black, 104 Mass. 400; 99 Mass. 315; 113 Mass. 486; 122 Mass. 76.

[8] Ramsay *v.* Warner, 97 Mass. 8.

[9] Minot *v.* Sawyer, 8 Allen (Mass.), 78.

the usury.[1] No deduction can be made for usurious interest already paid by a former owner.[2]

Neither can the mortgagor be allowed in the account treble damages for waste committed by the mortgagee pending the bill to redeem, as such damages can only be enforced in the manner provided by statute.[3]

Usury cannot be shown in defence to a bill to redeem unless the usury and the facts and circumstances constituting it are set up in the answer.[4]

1106. The decree. — The form of the judgment ordinarily is that the plaintiff may redeem upon paying the amount found due on the mortgage within a specified time, together with costs; and that upon his doing so the defendant shall discharge the mortgage and deliver up the mortgaged premises; and that upon default of such payment the complaint be dismissed with costs.[5]

A decree which declares that upon redemption the mortgagor shall hold the premises discharged of the mortgage and free from all right, title, and estate under the mortgage, gives no rights as against tenants of the mortgagee beyond what he would otherwise have upon redemption.[6]

When nothing is found due to the mortgagee, the mortgagor is not only entitled to a discharge of the mortgage but to a judgment for possession, and to a writ of possession to recover it.[7]

1107. The decree should fix a time within which the redemption is to take place. This time rests in the sound discretion of the court in view of all the circumstances. The usual time is six months;[8] if the plaintiff neglects to redeem within the time specified his right is barred forever.[9] Additional time might be allowed to enable the plaintiffs to obtain contribution from one of the defendants who is also interested in the equity of redemption;[10] or it may be allowed when the failure to pay was

[1] Adams *v.* McKenzie, 18 Ala. 698.

[2] Perrine *v.* Poulson, 53 Mo. 309; Kirkpatrick *v.* Smith, 55 Mo. 389.

[3] Boston Iron Co. *v.* King, 2 Cush. (Mass.) 400.

[4] Waterman *v.* Curtis, 26 Conn. 241.

[5] Wait's Prac. 288; 2 Barb. Ch. Pr. 199; Pitman *v.* Thornton, 66 Me. 469.

[6] Holt *v.* Rees, 46 Ill. 181.

[7] Churchill *v.* Beale, MSS. 2 Ben. & Heard Dig. (Mass.) 306. See Gerrish *v.* Black, 122 Mass. 76.

[8] Novosielski *v.* Wakefield, 17 Ves. 417; Waller *v.* Harris, 7 Paige (N. Y.), 167; Perine *v.* Dunn, 4 Johns. (N. Y.) Ch. 140; Brinckerhoff *v.* Lansing, Ib. 65; Dunham *v.* Jackson, 6 Wend. (N. Y.) 22.

[9] Sherwood *v.* Hooker, 1 Barb. (N. Y.) Ch. 650.

[10] Brinckerhoff *v.* Lansing, 4 Johns. (N. Y.) Ch. 65.

occasioned by fraud, accident, or mistake; but if the negligence of the complainant himself has contributed to such failure, it is proper to refuse to extend the time.[1] The time of redemption was extended for thirty days, where the decree omitted to declare what should be the effect of an omission to redeem, although the effect of such decree was, the court declared, that if the plaintiff should fail to pay the money within the time specified, his right to redeem would be barred.[2] But the same reasons do not exist for such extension of the time that exist in case of a strict foreclosure, because in redemption the plaintiff should be prepared to pay, and he in fact proffers payment by his bill.[3]

Instead of a decree requiring the mortgagor to pay the debt by a given day, or that his bill shall stand dismissed, the practice has sometimes prevailed in Virginia and North Carolina to order a sale of the property and the payment of the mortgage out of the proceeds, and the surplus to the mortgagor. The defendant may also in his answer ask a foreclosure.[4]

1108. If a mortgagor, who has brought a bill to redeem, fails to pay the amount found due within the time ordered, and the mortgagee obtains judgment for costs, the mortgage is foreclosed without any formal decree dismissing the bill;[5] although, according to other authorities, a final decree of dismissal must be first entered, upon the ground that until such final order is entered the records of the court are not complete, and the plaintiff may come in with an application to have the time within which he may redeem extended.[6] The decree of dismission with costs is equivalent to a decree of foreclosure,[7] and has this effect although it does not expressly declare it.[8]

If the plaintiff after obtaining a judgment for redemption fails to pay the amount found due within the time allowed, his bill will

[1] Segrest *v.* Segrest, 38 Ala. 674; Cilley *v.* Huse, 40 N. H. 358.

[2] Sherwood *v.* Hooker, 1 Barb. (N. Y.) Ch. 650.

[3] Jenkins *v.* Eldredge, 1 Wood. & M. 61; Perine *v.* Dunn, 4 Johns. (N. Y.) Ch. 140.

[4] Turner *v.* Turner, 3 Munf. (Va.) 66; Ingram *v.* Smith, 6 Ired. (N. C.) Eq. 97; Darvin *v.* Hatfield, 4 Sandf. (N. Y.) 468; Sutherland *v.* Rose, 47 Barb. (N. Y.) 144.

[5] Stevens *v.* Miner, 110 Mass. 57.

[6] Bolles *v.* Duff, 43 N. Y. 469; Smith *v.* Bailey, 10 Vt. 163.

[7] Quin *v.* Brittain, Hoff. (N. Y.) Ch. 353; Shannon *v.* Speers, 2 A. K. Marsh. (Ky.) 311.

[8] Bolles *v.* Duff, 43 N. Y. 474; Beach *v.* Cooke, 28 N. Y. 535; Perine *v.* Dunn, 4 Johns. (N. Y.) Ch. 140; Sherwood *v.* Hooker, 1 Barb. (N. Y.) Ch. 650.

be dismissed with costs, and such a dismissal amounts to a foreclosure of his equity of redemption.[1] It is dismissed as a matter of course upon motion supported by affidavit that the time within which the plaintiff was allowed to redeem has expired, and the money found due has not been paid.[2]

1109. Abandonment of suit. — A mortgagor of land subject to two mortgages filed a bill to redeem it from the first just before the expiration of the three years after open and peaceable entry. While the suit was pending, and after the three years expired, the first mortgagee executed a quitclaim deed of the land to the second mortgagee. It was held that upon the subsequent abandonment of the suit by the mortgagor the second mortgagee succeeded to all the rights of the first mortgagee, and held the estate by an indefeasible title under a completed foreclosure.[3]

1110. Redemption does not necessarily extinguish the mortgage title. If the plaintiff owns every other interest in the land there is a merger of this title; but if there are intermediate incumbrances, he becomes substituted to the rights and interests of the original mortgagee; and such incumbrancer must redeem of him if he wishes to protect his own interest.[4]

1111. The general rule in regard to costs upon a suit to redeem is that the plaintiff, instead of recovering costs himself, pays them to the defendant, although he is successful in the suit.[5] This is upon the principle that at law the mortgage is forfeited, and that the legal estate being in the mortgagee he is at liberty to deal with the property as his own.[6] The mortgagor, on the other hand, is in default; and this relief in equity is in the nature of a favor conferred, and not a right contracted for. An exception is made to this rule where the defendant sets up an unwarranted defence, or one which wholly fails, and thereby makes delay and expense in prosecuting the redemption; in such case the defendant may, in the discretion of the court, be compelled to

[1] Bishop of Winchester *v.* Paine, 11 Ves. 199; Cholmley *v.* Countess of Oxford, 2 Atk. 267; Perine *v.* Dunn, 4 Johns. (N. Y.) Ch. 140.

[2] McDonough *v.* Shewbridge, 2 Ba. & Be. 564; Stuart *v.* Worrall, 1 Bro. C. C. 581.

[3] Thompson *v.* Kenyon, 100 Mass. 108.

[4] Brainard *v.* Cooper, 10 N. Y. 356.

[5] Harper *v.* Ely, 70 Ill. 581; Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48; Brockway *v.* Wells, Ib. 617; Benedict *v.* Gilman, 4 Ib. 58; Vroom *v.* Ditmas, Ib. 526; Bean *v.* Brackett, 35 N. H. 88; Phillips *v.* Hulsizer, 20 N. J. Eq. 308.

[6] Wetherell *v.* Collins, 3 Madd. 255.

pay costs to the plaintiff.[1] If the amount due upon the mortgage is in dispute, although the defendant proves to be in error, yet if he had a reasonable ground for his view of the case the costs will still be awarded against the plaintiff.[2]

In suits to redeem costs are sometimes not allowed to either party as against the other.[3] This has been the rule adopted by some courts where the plaintiff before bringing his suit tendered the amount due upon the mortgage, and any costs which had been incurred.[4]

If a tender be made by the mortgage debtor after the bringing of a suit to foreclose, as the amount of costs in an equitable suit for the purpose is discretionary with the court, he can only make tender of such costs as may seem to him reasonable, and upon refusal apply to the court to have the amount of costs determined.[5]

1112. Under a statute providing that the plaintiff bringing a suit to redeem without a previous tender shall pay the costs of suit, unless the defendant when requested has neglected or refused to render a just and true account, the plaintiff so bringing suit is liable for costs, although the defendant be liable under the usury law to forfeit threefold the unlawful interest.[6]

In Massachusetts it is provided by statute that if the suit is brought without a previous tender, and it appears that anything is due upon the mortgage, the plaintiff shall pay the costs of suit, unless the defendant has unreasonably refused or neglected, when requested, to render a true account of the money due on the mortgage, and of the rents and profits, or has in any way prevented the plaintiff from performing or tendering performance of the condition before bringing suit. In all other cases the court may award costs to either party as equity may require.[7] Under these provisions the mortgagee may be ordered to pay the plaintiff's costs when upon request for an account he has failed to render

[1] Davis *v.* Duffie, 18 Abb. (N. Y.) Pr. 360; Barton *v.* May, 3 Sandf. (N. Y.) Ch. 450.

[2] Sessions *v.* Richmond, 1 R. I. 298.

[3] Green *v.* Wescott, 13 Wis. 606.

[4] King *v.* Duntz, 11 Barb. (N. Y.) 191; Van Buren *v.* Olmstead, 5 Paige (N. Y.), 9.

[5] Pratt *v.* Ramsdell, 16 How. (N. Y.) Pr. 59; Bartow *v.* Cleveland, Ib. 364. The statute providing for tender to a plaintiff to stop costs is confined to actions at law. N. Y. F. & M. Ins. Co. *v.* Burrell, 9 How. (N. Y.) Pr. 398.

[6] Gerrish *v.* Black, 113 Mass. 486; 99 Mass. 315; 104 Mass. 400; 122 Mass. 76. And see McGuire *v.* Van Pelt, 55 Ala. 344.

[7] Gen. Stat. c. 140, § 21.

any account, or has rendered an untrue one, so that the mortgagor is compelled to resort to a suit.[1] But in a case where there was no tender, and the account rendered by the mortgagee was incorrect only because it contained items of money expended for convenience and ornament of the estate, costs were allowed to neither party.[2]

There is a similar statute in Maine.[3] As the law now stands in this state no suit can be maintained without a tender, unless the defendant is in default in preventing a tender. If the bill is sustained, the plaintiff is in all cases entitled to costs as a strict legal right.[4]

What constitutes a sufficient demand and refusal to account under this statute depends upon the particular circumstances; thus when the mortgagor made a demand on the mortgagee at a store two miles distant from his residence to render an account, to which the reply was that about eleven hundred dollars was due, and the mortgagee, when afterwards requested to render a more particular account, replied that he would not until obliged, no objection being made to the place of demand, it was considered sufficient to sustain a bill to redeem brought four years afterwards.[5]

1113. A mortgagee who has refused a tender of a sum sufficient to cover principal, interest, and costs, will be compelled to pay the costs of a suit to redeem.[6]

The costs of a suit to foreclose a prior mortgage are not chargeable to a junior mortgagee who was not a party to it, when he redeems.[7]

[1] Montague *v.* Phillips, 16 Gray (Mass.), 566; Pease *v.* Benson, 28 Me. 336; Roby *v.* Skinner, 34 Me. 270; Sprague *v.* Graham, 38 Me. 328; Dinsmore *v.* Savage, 68 Me. 191.

[2] Woodward *v.* Phillips, 14 Gray (Mass.), 132.

[3] R. S. 1871, c. 90, § 13; Dinsmore *v.* Savage, *supra.*

[4] Dinsmore *v.* Savage, *supra.*

[5] Wallace *v.* Stevens, 66 Me. 190.

[6] Grugeon *v.* Gerrard, 4 Y. & C. Exch. Ca. 128; Harmer *v.* Priestley, 16 Beav. 569.

[7] Gage *v.* Brewster, 31 N. Y. 218, reversing S. C. 30 Barb. 387.

CHAPTER XXIII.

MORTGAGEE'S ACCOUNT.

I. Liability to account, 1114–1120.
II. What the mortgagee is chargeable with, 1121–1125.
III. Allowances for repairs and improvements, 1126–1131.
IV. Allowances for compensation, 1132–1133.
V. Allowances for disbursements, 1134–1138.
VI. Annual rests, 1139–1143.

1. *Liability to Account.*

1114. In general. — A mortgagee in possession, whether in person or by a tenant, is accountable for the rents and profits of the estate, and is bound to apply them in reduction of the mortgage debt.[1] After paying the interest of the debt any balance of receipts is applicable to reduce the principal.[2] The mortgagee is not allowed to make a profit out of his possession of the estate. Therefore, upon a redemption of the mortgaged premises by any one interested in them he is obliged to state an account of his receipts from the mortgaged property, and he is entitled to allowances for all proper disbursements made by him in respect of the premises. The principles upon which this account should be stated it is the purpose of this chapter to set forth. The subject is of much less general importance than it formerly was, for the reason that it is comparatively seldom now that the mortgagee takes possession. In many states, as already noticed, the mortgagee is prohibited by statute from entering or in any way acquiring possession before a foreclosure and sale. In other states, power of sale mortgages and trust deeds are in common use, and upon a default a speedy sale of the property may be had, so that there is not generally any occasion for the mortgagee to take possession of the mortgaged estate.

[1] Harrison *v.* Wyse, 24 Conn. 1; Kellogg *v.* Rockwell, 19 Conn. 446; Reitenbaugh *v.* Ludwick, 31 Pa. St. 131; Breckenridge *v.* Brook, 2 A. K. Marsh. (Ky.) 335; Tharp *v.* Feltz, 6 B. Mon. (Ky.) 6; Anthony *v.* Rogers, 20 Mo. 281; Chapman *v.* Porter, 69 N. Y. 276.

[2] McConnel *v.* Holobush, 11 Ill. 61; Walton *v.* Withington, 9 Mo. 545.

1115. A matter of equitable jurisdiction. — It is apparent enough that where the English doctrine prevails that the mortgage conveys a legal title, the right of the mortgagor to an account of the rents and profits of the land received by the mortgagee is purely and exclusively of equitable cognizance. At law he cannot be made to account. He is the legal owner of the estate, and takes the rents and profits in that character. The mortgagor has a right of redemption only in equity, and the right to an account is only incident to this. But regarding the mortgagee's interest as a lien only does not obviate the necessity of resorting to equity for an accounting.[1] The mortgagee in possession takes the rents and profits in the *quasi* character of trustee or bailiff of the mortgagor. In equity he must apply them as an equitable set-off to the amount due on the mortgage. Such a receipt is not a legal satisfaction of the mortgage. There is no payment and satisfaction of the mortgage until the rents and profits are applied to the payment of the debt. The law does not apply them as they are received. "It depends upon the result of an accounting upon equitable principles whether any part of the rents and profits received shall be so applied. The mortgagee is entitled to have them applied, in the first instance, to reimburse him for taxes and necessary repairs made upon the premises; for sums paid by him upon prior incumbrances upon the estate, in order to protect the title, and for costs in defending it; and if he has made permanent improvements upon the land, in the belief that he was the absolute owner, the increased value by reason thereof may be allowed him. In many cases complicated equities must be determined and adjusted before it can be ascertained what part, if any, of the rents and profits received is to be applied upon the mortgage debt. In the absence of an agreement between the parties, there is no legal satisfaction of the mortgage by the receipt of rents and profits by a mortgagee in possession, to an amount sufficient to satisfy it, and his character as mortgagee in possession is not divested until they are applied by the judgment of the court in satisfaction of the mortgage."[2]

1116. The mortgagee chargeable only upon redemption. — The mortgagor's right to hold the mortgagee to account for rents and profits of the mortgaged premises, or for waste done to them,

[1] Hubbell *v.* Moulson, 53 N. Y. 225.

[2] Per Mr. Justice Andrews, in Hubbell *v.* Moulson, 53 N. Y. 225.

must be enforced in equity and not by suit at law.[1] He is not chargeable so long as the premises are not redeemed. He is the legal owner of the estate, and his accountability for rent is incident only to the right in equity to redeem. There may be a special agreement between the parties that the mortgagee shall pay rent; he may be a lessee of the premises; but after the expiration of the term of his tenancy, there is no implication of an agreement to continue to pay rent.[2] If an estate under lease for a term of years be mortgaged to the lessee in fee, unless the mortgagee voluntarily pays the rent, or the mortgage makes special provision that he shall hold possession in the capacity of lessee, the rent is suspended until the condition be performed, or the estate redeemed. Upon redemption, of course, the lessee, during the term of the lease, will be accountable as mortgagee for the profits. If, however, he voluntarily pay the rent during such term, he is not afterwards accountable for the same as mortgagee.[3]

A mortgagor who has paid the mortgage debt without requiring the mortgagee to account for rents received by him while he was in possession cannot afterwards maintain an action against him for use and occupation; but he may maintain an action for money had and received to recover back the amount overpaid, which ought to have been allowed for rent;[4] and if the rents and profits exceed the amount of the debt and interest, the excess may be recovered.[5]

An action of trespass *quare clausum* will not lie by a mortgagor against his mortgagee for entering and harvesting the growing crops. These are vested in the mortgagee, and he is entitled to them as a part of his security; and is liable to account for them only in equity upon a redemption.[6] The objection to such action does not lie when there is an agreement between the parties which makes the mortgagor a tenant of the mortgagee.[7]

[1] Farrant *v.* Lovel, 3 Atk. 723; Dexter *v.* Arnold, 2 Sum. 124; Gordon *v.* Hobart, 2 Story, 243; Seaver *v.* Durant, 39 Vt. 103; Chapman *v.* Smith, 9 Vt. 153; Givens *v.* McCalmot, 4 Watts (Pa.), 464; Bell *v.* Mayor of N. Y. 10 Paige (N. Y.), 49.

[2] Weeks *v.* Thomas, 21 Me. 465.

[3] Newall *v.* Wright, 3 Mass. 138.

[4] Wood *v.* Felton, 9 Pick. (Mass.) 171; see, however, Barrett *v.* Blackmar, 47 Iowa, 565.

[5] Freytag *v.* Hoeland, 23 N. J. Eq. 36.

[6] Gilman *v.* Wills, 66 Me. 273, and cases cited; Reed *v.* Elwell, 46 Me. 270.

[7] Marden *v.* Jordan, 65 Me. 9.

1117. A grantee in possession under a deed absolute in form, but given by way of security merely, is said not to stand exactly in the same position, in reference to accounting, as an ordinary mortgagee in possession; inasmuch as he is the agent of the mortgagor as well as mortgagee, and is chargeable for any failure to obtain the full rental value of the premises only on the same grounds that an agent would be.[1] If the grantee has good reason to consider himself possessed of an absolute estate in the land, and he consequently makes permanent improvements, he will be entitled to allowance for these when a mortgagee generally would not be entitled to such allowance.[2]

But ordinarily the same rules for accounting are held to apply in such case; the mortgagee is compelled to account for the rents and profits, and he may be allowed for necessary and proper repairs, but not for costly improvements, unless these be made with the mortgagor's consent, however beneficial they may be. But if such improvements are made in good faith on the part of the mortgagee, under the belief that he owns the property absolutely, he may be allowed for them.[3]

1118. A mortgagee is equally liable to account whether his possession be before or after the law day, unless there is some agreement to the contrary.[4] An equitable mortgagee is under the same obligation to account that a legal mortgagee is.[5] Where redemption is allowed after a foreclosure sale, if the mortgagee purchases and enters into possession he must account for the rents and profits.[6]

A mortgagee who has entered into possession and received the rents and profits of the mortgaged premises, and afterwards purchased the equity of redemption, is still liable, so far as a subsequent mortgagee is concerned, to account for the rents and profits of the premises received while he occupied as mortgagee. When the second mortgagee applies to redeem a prior mortgage he stands in the same position as the mortgagor, and is bound to pay no greater sum than the mortgagor would pay.[7]

[1] Barnard *v.* Jennison, 27 Mich. 230.

[2] Harper's Appeal, 64 Pa. St. 315.

"There is a manifest distinction," says Judge Sharswood, "between the two cases in reason and justice, which are controlling guides in a court of equity, where no positive rule of law intervenes." The cases in Pennsylvania are reviewed and the law on this point clearly stated.

[3] Cookes *v.* Culbertson, 9 Nev. 199.

[4] Davis *v.* Lassiter, 20 Ala. 561.

[5] Brayton *v.* Jones, 5 Wis. 117.

[6] Ten Eyck *v.* Casad, 15 Iowa, 524; and see Hill *v.* Hewett, 35 Iowa, 563.

[7] Harrison *v.* Wyse, 24 Conn. 1.

A mortgagee in possession after default is presumed to be in possession in his character of mortgagee, and as such to be liable to account for rents and profits; and such is the presumption, although he first occupied as a tenant for a fixed term, and while so occupying purchased the mortgage, and remained in possession after the expiration of his term; he is presumed to be in occupation as a mortgagee, and not as a tenant holding over.[1]

The mortgagee must account for the rents and profits received by him after a decree of strict foreclosure upon a redemption within the time allowed by the decree.[2] A purchaser at a foreclosure sale, which is defective by reason that a junior mortgagee was not made a party to the bill, must account for the rents and profits upon a subsequent redemption by the latter, if such sale operates merely as an assignment of the mortgage;[3] but if it operates not only as an assignment of the prior mortgage, but as a foreclosure of the equity of redemption subject to the junior mortgage, the purchaser standing in the place of the mortgagor or owner of the premises is not liable to account for the rents and profits. If the junior mortgagee wishes to secure these, he must obtain the appointment of a receiver upon showing the insufficiency of his security.[4]

1119. An assignee stands in the place of his assignor in respect to the account, whether he be an assignee of the mortgage or of the equity of redemption. The mortgagee's liability to account to the mortgagor for the rents and profits, less the amount paid for taxes and repairs, attaches to the assignee of the mortgage, and the assignee of the mortgagor acquires the rights of the latter in this respect.[5] A transfer of the equity of redemption while the mortgagee is in possession necessarily carries with it to the purchaser the right to an account for the rents and profits of the premises, as an incident to the right of redemption, both those received by the mortgagee before the sale and those received afterwards.[6]

1120. So long as the mortgagee refrains from taking possession, he has no right to the rents and profits received by the

[1] Anderson *v.* Lanterman, 27 Ohio St. 104; Moore *v.* Degraw, 1 Halst. (N. J.) Ch. 346; Hilliard *v.* Allen, 4 Cush. (Mass.) 532.

[2] Ruckman *v.* Astor, 9 Paige (N. Y.), 517; see Chapman *v.* Smith, 9 Vt. 153.

[3] Ten Eyck *v.* Casad, 15 Iowa, 524.

[4] Renard *v.* Brown, 7 Neb. 449.

[5] Strang *v.* Allen, 44 Ill. 428.

[6] Ruckman *v.* Astor, 9 Paige (N. Y.), 517; and see Gelston *v.* Thompson, 29 Md. 595.

mortgagor or any one under him; and although there has been a breach of the condition, the owner of the equity of redemption cannot be called upon to account.[1] He may redeem without paying rent, even when he has been allowed to remain in possession under an agreement to pay to the mortgagee a stipulated rent, because the mortgage does not secure the rent. The agreement to pay this is merely personal.[2]

But it has been held that when the mortgaged premises have been devised by an insolvent owner to the mortgagee, and he has entered as devisee, the creditors of the estate have the right to demand an account from him of the rents and profits.[3]

A mortgagor in possession is not bound to rebuild structures destroyed by fire,[4] or to repair the premises when they have been injured without his default.[5]

2. *What the Mortgagee is chargeable with.*

1121. A mortgagee allowing the mortgagor to remain in occupation after the former has taken possession for the purpose of foreclosure does not necessarily render himself accountable for rents and profits. If the mortgagor is permitted to remain in occupation, and to take the profits, of course the mortgagee is not accountable for them to him;[6] nor has a second mortgagee in such case any claim upon the first mortgagee to account after formal possession taken by the former. The second mortgagee may take possession as against the mortgagor if the latter holds in his own right, and thus exclude him and take the rents and profits to his own use. If the first mortgagee should by previous entry and actual occupation, or by virtue of his superior title, prevent the second mortgagee from making entry, then he would be held to account, in favor of the second mortgagee, for the rents and profits.[7] A second mortgagee has also the full power in any

[1] Colman *v.* Duke of St. Albans, 3 Ves. 25; Higgins *v.* York Buildings Co. 2 Atk. 107; Drummond *v.* Duke of St. Albans, 5 Ves. 438; Hele *v.* Lord Bexley, 20 Beav. 127; Johnson *v.* Miller, 1 Wils. (Ind.) 416; Butler *v.* Page, 7 Met. (Mass.) 40, 42.

[2] Merritt *v.* Hosmer, 11 Gray (Mass.), 276; and see Chase *v.* Palmer, 25 Me. 341; Davenport *v.* Bartlett, 9 Ala. 179; Gilman *v.* Wills, 66 Me. 273.

[3] Chalabre *v.* Cortelyou, 2 Paige (N. Y.), 605.

[4] Reid *v.* Bank of Tenn. 1 Sneed (Tenn.), 262.

[5] Campbell *v.* Macomb, 4 Johns. (N. Y.) Ch. 534.

[6] Reynolds *v.* Canal & Banking Co. of N. O. 30 Ark. 520.

[7] Coppring *v.* Cooke, 1 Vern. 270; Demarest *v.* Berry, 16 N. J. Eq. 481; Hitchcock *v.* Fortier, 65 Ill. 239.

case to protect himself, by paying off the first mortgage and taking entire control of the mortgaged premises. The taking of formal possession and the recording of the certificate in the registry of deeds does not estop the first mortgagee to show that he was not in actual possession, nor does his formal entry imply a continued possession under such entry; and if a second mortgagee would charge the first with the rents and profits, he should attempt to enter under his own mortgage, or should tender the debt due to the first mortgagee.[1]

As against a purchaser from the mortgagor, the mortgagee has no right to allow any one, as, for instance, the widow of the mortgagor, to occupy the premises or any part of them without paying rent. He is liable to account for the whole profits of the estate, after allowing a reasonable time to gain possession by legal process.[2]

A mortgagee is not accountable to a subsequent incumbrancer or purchaser for the rent of a house of which he has taken formal possession for the purpose of foreclosure, when the house is occupied under of a claim of right adversely to him; as, for instance, when occupied by the mortgagor and his family under a homestead right not released in the mortgage.[3] But if the mortgagor has a right of homestead in a part of the mortgaged premises, which right he has released in a first mortgage but not in a second, the first mortgagee having taken actual possession for the purpose of foreclosure, and allowed the mortgagor to occupy the homestead, is accountable to the second mortgagee for the rent he might have obtained for the homestead.[4]

1122. Where the mortgagee has himself occupied and improved the estate in person, the value of the occupation must necessarily be determined by evidence of experts as to what ought to have been received for the rent of the property;[5] and such evidence is also admissible in cases where the mortgagee, not being himself in possession, has kept false accounts or no accounts of rents received, or there is such misconduct of any kind on his part

[1] Bailey *v.* Myrick, 52 Me. 132; Charles *v.* Dunbar, 4 Met. (Mass.) 498.

[2] Thayer *v.* Richards, 19 Pick. (Mass.) 398.

[3] Taft *v.* Stetson, 117 Mass. 471; Silloway *v.* Brown, 12 Allen (Mass.), 30.

[4] Richardson *v.* Wallis, 5 Allen (Mass.), 78.

[5] Smart *v.* Hunt, 1 Vern. 418; Trulock *v.* Robey, 15 Sim. 265; Johnson *v.* Miller, 1 Wils. (Ind.) 416; Montgomery *v.* Chadwick, 7 Iowa, 114; Moore *v.* Degraw, 5 N. J. Eq. (1 Halst.) 346; Van Buren *v.* Olmstead, 5 Paige (N. Y.), 9.

as makes a resort to this kind of evidence necessary. But the mere fact that the mortgagee resides at a distance, and must rely upon agents to manage the estate, should not make evidence of experts that a higher rent could have been received admissible to charge him with a greater amount of rent than he has received.[1]

If a mortgagee himself occupies the premises, especially if they consist of a farm under cultivation, upon which labor and money must be bestowed to produce annual crops, he will be charged with such sums as will be a fair rent of the premises without regard to what he may realize as profits from the use of it. The expenditures necessary to carry on a farm, and the profits derived from it, are so wholly within the knowledge of the occupant that it would be impossible for the mortgagor to show the account to be wrong, except in the result.[2]

What is a reasonable rent is a matter to be determined from a consideration of all the circumstances of the case. The price that might be obtained by a letting at public auction is not necessarily a proper criterion; for in many cases such a rent would be no just standard of the real value of the rent.

1123. As a general rule the mortgagee in possession is held to the exercise of such care and diligence as a provident owner in charge of the property would exercise; but he will not be held accountable for anything more than the actual rents and profits received, unless there has been wilful default or gross negligence on his part.[3] It is the fault of the mortgagor that he lets the land fall into the hands of the mortgagee, and the mortgagor should be required to prove actual fraud or negligence on the part of the mortgagee before he can be charged for more than his actual receipts of rents and profits.

He will not be held to account according to the value of the property, but for what he should with reasonable care and attention have received. Neither is he required to enter into any speculations for the benefit of the mortgagor,[4] but to protect the prop-

[1] Gerrish *v.* Black, 104 Mass. 400.

[2] Sanders *v.* Wilson, 34 Vt. 318.

[3] Parkinson *v.* Hanbury, L. R. 2 H. of Lords, 1; Hughes *v.* Williams, 12 Ves. 493; Shaeffer *v.* Chambers, 2 Halst. (N. J.) Eq. 548; Walsh *v.* Rutgers Fire Ins. Co. 13 Abb. (N. Y.) Pr. 33; Barron *v.* Paulling, 38 Ala. 292; Milliken *v.* Bailey, 61 Me. 316; Van Buren *v.* Olmstead, 5 Paige (N. Y.), 8; Quinn *v.* Brittain, 3 Edw. (N. Y.) 314; Moore *v.* Titman, 44 Ill. 367; Strang *v.* Allen, Ib. 428; Harper *v.* Ely, 70 Ill. 581; Montague *v.* Boston & Albany R. R. Co. 124 Mass. 242.

[4] Hughes *v.* Williams, 12 Ves. 493;

erty as it is, and to obtain from it what returns it will yield under prudent management.

If the mortgagee suffers a notoriously insolvent tenant to remain in possession he is accountable for the rent during such time, deducting the time reasonably necessary to expel him by legal means, and to obtain a responsible tenant.[1] It is wilful default on the part of the mortgagee to allow a tenant to remain in possession several years without paying rent, and without any demand upon him for it.[2] He may also render himself liable for the rents and profits by assigning the premises to an insolvent person, and putting him in possession.[3] A mortgagee is liable for rent lost or not collected through the wilful or gross negligence of his agent, although ordinary and proper care was exercised in the selection of the agent.[4]

If he has lost rent which he should have received, as, for instance, by refusing a higher rent from a responsible tenant, or by turning out without sufficient cause a responsible tenant, and then getting less rent or none at all, he is chargeable with the rent lost. If the mortgagor is aware that a higher rent may be obtained, he should inform the mortgagee of the fact; and his neglect to do so may prevent his charging the mortgagee with such higher rent.[5] But when the mortgagee in the exercise of a reasonable discretion and care has already agreed upon the terms of a lease, he is not chargeable with a higher rent for the reason that the mortgagor or any one else offers a higher rent.[6]

It has been suggested that when the mortgagee is unable to procure a tenant for a large farm, it may be his duty to cause it to be tilled in accordance with good ordinary husbandry.[7]

A mortgagee having properly rented the premises to a tenant is not accountable for damages done to the estate without his knowledge; or for wood cut and used on the premises for firewood by such tenant.[8]

But he must account for waste committed by him while person-

Rowe *v.* Wood, 2 J. & W. 553, in relation to working a mine.

[1] Miller *v.* Lincoln, 6 Gray (Mass.), 556.

[2] Brandon *v.* Brandon, 10 W. R. 287.

[3] Hagthrop *v.* Hook 1 Gill & J. (Md.) 270.

[4] Montague *v.* Boston & Albany R. R. Co. 124 Mass. 242.

[5] Hughes *v.* Williams, 12 Ves. 493; Montague *v.* Boston & Albany R. R. Co. *supra.*

[6] Hubbard *v.* Shaw, 12 Allen (Mass.), 120. See Montague *v.* Boston & Albany R. R. Co. *supra.*

[7] Shaeffer *v.* Chambers, 2 Halst. (N. J.) Eq. 548.

[8] Hubbard *v.* Shaw, 12 Allen (Mass.), 120; Onderdonk *v.* Gray, 19 N. J. Eq. 65.

ally in possession.[1] When the security is insufficient, he will not be enjoined from cutting timber or opening a mine. So long as he does not commit wanton destruction, he may also clear and cultivate the land.[2] He is entitled to make the most of the property for the purpose of realizing what is due to him. He has only to account for the proceeds of the property.[3]

1124. If the mortgagee has kept no proper accounts of the rents and profits received by him, he is chargeable with what he might have received, and must be presumed to have received by the use of ordinary care.[4] If the mortgagee be unable to render an account, he is chargeable with a fair occupying rent.[5]

The account must include all rents received from the time of the mortgagee's entry into possession.[6] Although redemption is sought by one having only a limited interest in the property, as, for instance, a right of dower, the mortgagee is liable to account not merely from the time of the demand upon him, but from the date of his entry.[7]

1125. A mortgagee may work a mine upon the mortgaged property, if the work be carried on in a proper manner.[8] Of course the product, less the expense of working it, must be applied to the payment of the mortgage debt. But he would not be justified in improving a mine by a large expenditure, or at most to advance more for this purpose than would a prudent owner.[9] A mortgagee may even open a new mine when the mortgaged estate is of insufficient value aside from the mine; and he is chargeable with only the net profits of working it.[10] But if the property is otherwise sufficient, the mortgagee has no right to open and work mines, and, if he does so, will be charged with the gross receipts, without any allowance for the expenses of working.[11]

[1] Sandon *v.* Hooper, 6 Beav. 246; Hornby *v.* Matcham, 16 Sim. 325; Lord Midleton *v.* Eliot, 15 Sim. 531; Onderdonk *v.* Gray, 19 N. J. Eq. 65.

[2] Morrison *v.* McLeod, 2 Ired. Eq. (N. C.) 108.

[3] Millett *v.* Davey, 31 Beav. 470, per Romilly, M. R.

[4] Dexter *v.* Arnold, 2 Sum. 108; Van Buren *v.* Olmstead, 5 Paige (N. Y.), 9.

[5] Montgomery *v.* Chadwick, 7 Iowa, 114; Gordon *v.* Lewis, 2 Sum. 150; Clark *v.* Smith, 1 Saxton (N. J.), 121.

[6] Lupton *v.* Almy, 4 Wis. 242; Ackerman *v.* Lyman, 20 Wis. 454; Reynolds *v.* Canal & Banking Co. of N. O. 30 Ark. 520.

[7] Dela *v.* Stanwood, 62 Me. 574.

[8] Irwin *v.* Davidson, 3 Ired. (N. C.) Eq. 311.

[9] Rowe *v.* Wood, 2 J. & W. 553, 556.

[10] Millett *v.* Davey, 31 Beav. 470.

[11] Millett *v.* Davey, *supra;* and see Hood *v.* Easton, 2 Giff. 692; 2 Jur. N. S. 729.

3. *Allowances for Repairs and Improvements.*

1126. The rule as to repairs. — Until foreclosure, the mortgagee, although in possession for the purpose of foreclosing, is not the owner of the property, but beyond securing payment of the debt due him is really in the position of trustee for the owner. He has no authority to make the estate better at the expense of the mortgagor, but is bound to use reasonable means to preserve the estate from loss and injury. He cannot charge the mortgagor with expenditures for convenience or ornament. The rule is sometimes stated to be that the mortgagee must preserve the estate in as good a condition as that in which he received it. But he may properly under some circumstances go beyond this, and supply things that were wanting at the time of entry; as where the doors or windows of a house are gone, he is justified in supplying these in order to put the estate in condition for occupation.[1] What is a proper expenditure must depend upon the circumstances of each case. If the estate be a valuable one, handsomely laid out, with many young fruit and ornamental trees, and the mortgagee cannot by reasonable efforts let it for a sum sufficient to keep it in proper repair and preserve the fruit trees, he may be allowed the expenses necessary to keep it in such repair; but not for expenditures in cultivating the land, or for money paid for a horse and cart and cow.[2]

The mortgagee in possession is bound to make all reasonable and necessary repairs, and is responsible for loss occasioned by his wilful default or gross neglect in this respect. What are reasonable and necessary repairs depends upon the particular circumstances of the case.[3] He is not to be charged with exactly the same degree of care that a person in possession of his own property would ordinarily take.[4] He is not bound to go further than to keep the estate in necessary repair; or to make full and complete repairs if he would thereby incur expense disproportionate to the value of the estate or to his own mortgage interest. He is not even bound to repair defects arising in the ordinary way by waste and decay.

[1] Woodward *v.* Phillips, 14 Gray (Mass.), 132.

[2] Sparhawk *v.* Wills, 5 Gray (Mass.), 423.

[3] Dexter *v.* Arnold, 2 Sum. 108; McCumber *v.* Gilman, 15 Ill. 381.

[4] Shaeffer *v.* Chambers, 2 Halst. (N. J.) Eq. 548.

1127. The ordinary rule in respect to improvements is that the mortgagee will not be allowed for them further than is proper to keep the premises in necessary repair. The improvements may be of permanent benefit to the estate; but unless made with the consent and approbation of the mortgagor no allowance can be made for them.[1] The mortgagee has no right to impose them upon the owner, and thereby increase the burden of redeeming. The improvements will enure to the benefit of the estate upon redemption, but in the mean time the mortgagee has the use of them. It is his own choice to make them while he holds only a defeasible title. A default having occurred, he can, except in those states where mortgages other than those having powers of sale must be foreclosed by entry and possession, by a foreclosure suit, either sell the property to another, or buy it himself and hold it absolutely.

But while the mortgagee in possession is not allowed to charge for lasting improvements, he is not on the other hand chargeable with the increased rents and profits which are directly traceable to such improvements made by him.[2] If, however, improvements be made by a third person in possession in his own wrong, they enure to the benefit of the mortgagor, and a mortgagee upon entry is chargeable with the rents arising from such improvements.[3] Such would also be the case if the improvements are made by the mortgagor. But the mortgagee is not otherwise responsible for improvements made by the mortgagor, either to him or to mechanics furnishing labor or material, without the mortgagee's direction.[4]

1128. Exception to the rule. — When the mortgagee makes permanent improvements, supposing he has acquired an absolute

[1] Harper's Appeal, 64 Pa. St. 315; Russell *v.* Blake, 2 Pick. (Mass.) 505; Clark *v.* Smith, Saxt. (N. J.) 121; Bell *v.* The Mayor, 10 Paige (N. Y.) Ch. 49; Quinn *v.* Brittain, Hoff. (N. Y.) Ch. 354; Moore *v.* Cable, 1 Johns. (N. Y.) Ch. 385, per Chancellor Kent; Mickles *v.* Dillaye, 17 N. Y. 80, per Denio, J.; Wetmore *v.* Roberts, 10 How. (N. Y.) Pr. 51; Benedict *v.* Gilman, 4 Paige (N. Y.), 58; Neale *v.* Hagthrop, 3 Bland (Md.) Ch. 590; Dougherty *v.* McColgan, 6 G. & J. 275; McCarron *v.* Cassidy, 18 Ark. 34; Hidden *v.* Jordan, 28 Cal. 301; 32 Cal. 397; Lowndes *v.* Chisholm, 2 McCord (S. C.) Ch. 455; Ruby *v.* Portland, 15 Me. 306; Hopkins *v.* Stephenson, 1 J. J. Marsh. (Ky.) 341.

[2] Moore *v.* Cable, 1 Johns. (N. Y.) Ch. 385; Bell *v.* The Mayor, 10 Paige (N. Y.), 49; Clark *v.* Smith, Saxt. (N. J.) 121, 138; and see Morrison *v.* McLeod, 2 Ired. (N. C.) Eq. 108.

[3] Merriam *v.* Barton, 14 Vt. 501.

[4] Holmes *v.* Morse, 50 Me. 102; Childs *v.* Dolan, 5 Allen (Mass.), 319.

title by foreclosure, upon a subsequent redemption he is allowed the value of them,[1] especially if the mortgagor has by his actions to any extent favored the mistaken belief.[2]

In like manner a purchaser at a foreclosure sale, who has made valuable improvements in the belief that he has acquired an absolute title, is entitled to be paid for them in case the premises are redeemed.[3] Such a purchaser, when the equity of redemption has not been cut off by the sale, is in fact an assignee of the mortgage title. In like manner a purchaser in good faith from the mortgagee in possession, and with the assurance that he gave a perfect title, is entitled to allowance for improvements made by him thereon, although these consist of new structures.[4]

The mortgagee may also be allowed for improvements when he has been in possession for a long period, and the mortgagor, knowing that the improvements were going on, interposed no objection.[5] And when he is allowed for the improvements he is chargeable with the rent on the property as improved, and not as it was exclusive of the improvements.[6]

1129. Allowance for repairs. — Though not bound to make permanent repairs, it is quite another question whether the mortgagee may not claim an allowance for proper expenditures for permanent repairs for the benefit of the estate.[7] The rule undoubtedly is that he may charge the cost of permanent improvements so far as they are necessary and beneficial to the estate.[8] All necessary repairs made by a mortgagee in possession should be allowed for in his accounts.[9] The fact that the necessary repairs of the premises exceed in cost the amount of the rents and

[1] Miner *v.* Beekman, 50 N. Y. 337; Putnam *v.* Ritchie, 6 Paige (N. Y.), 390; Wetmore *v.* Roberts, 10 How. (N. Y.) Pr. 51; Fogal *v.* Pirro, 17 Abb. (N. Y.) Pr. 113; 10 Bosw. 100; Benedict *v.* Gilman, 4 Paige (N. Y.), 58; Troost *v.* Davis, 31 Ind. 34; Roberts *v.* Fleming, 53 Ill. 198; Gillis *v.* Martin, 2 Dev. N. C. Eq. 470.

[2] Bacon *v.* Cottrell, 13 Minn. 194.

[3] Green *v.* Dixon, 9 Wis. 532; Green *v.* Wescott, 13 Wis. 606; Bacon *v.* Cottrell, 13 Minn. 194; Barnard *v.* Jennison, 27 Mich. 230; Vanderhaise *v.* Hugues, 2 Beas. (N. J.) 410; Harper's Appeal, 64 Pa. St. 315.

[4] McSorley *v.* Larissa, 100 Mass. 270; Mickles *v.* Dillaye, 17 N. Y. 80; and see Miner *v.* Beekman, 50 N. Y. 337, 345; Bright *v.* Boyd, 1 Story C. C. 478.

[5] Montgomery *v.* Chadwick, 7 Iowa, 114; Roberts *v.* Fleming, 53 Ill. 196, 204.

[6] Montgomery *v.* Chadwick, *supra.*

[7] Bollinger *v.* Chouteau, 20 Mo. 89.

[8] Boston Iron Co. *v.* King, 2 Cush. (Mass.) 400; Reed *v.* Reed, 10 Pick. (Mass.) 400.

[9] Sandon *v.* Hooper, 6 Beav. 246; Neesom *v.* Clarkson, 4 Hare, 97; Harper's Appeal, 64 Pa. St. 315; Adkins *v.* Lewis, 5 Oregon, 292; Strong *v.* Blanchard, 4 Allen (Mass.), 538.

profits is no objection to their allowance.[1] Neither is there any objection to an allowance for repairs of such sums as the master, in stating the account, has found to be reasonable, and to have been actually paid, although the mortgagee is unable to give dates and items of all the repairs.[2]

But repairs which are demanded merely for the purpose of ornament or comfort while the mortgagee himself occupies the premises, and are not of any substantial benefit to the realty, will not be allowed.[3] And so also charges for new buildings or structures which are not necessary for the preservation of the estate should not be allowed.[4]

1130. If the mortgagee so intermingle the mortgaged property with his own that it is impracticable to ascertain how much of certain charges ought to be borne by the mortgaged estate, he will not be allowed anything in respect to such charges.[5]

1131. A mortgagee in possession of a church edifice, and using it, with the consent of the mortgagor, for religious services, upon accounting was charged with the actual receipts from pew rents, but was not allowed for the expenses of conducting religious services. There seems to have been no proof offered that the pew rents were paid in consideration of the preaching, the music, with the adjuncts of light and warmth, and the services of the sexton; and it was suggested that they may have been paid for the privilege of assembling for the performance of religious services, and for the advantage of the Sunday-school and the lecture room. In the absence of proof, there was no presumption that the preaching, the music, and the like, were the consideration for which the rents were paid.[6]

4. *Allowance for Compensation.*

1132. A mortgagee in possession is not entitled to compensation for his own trouble in taking care of the estate and renting it, although there is an agreement between him and the mortgagor that he shall have such compensation.[7] The reason

[1] Reed *v.* Reed, 10 Pick. (Mass.) 398.

[2] Montague *v.* Boston & Albany R. R. Co. 124 Mass. 242.

[3] Madison Av. Church *v.* Oliver St. Church, 41 Superior Ct. (N. Y.) 369.

[4] Reed *v.* Reed, 10 Pick. (Mass.) 398; Russell *v.* Blake, 2 Pick. (Mass.) 505.

[5] Elmer *v.* Loper, 25 N. J. Eq. 475.

[6] Madison Av. Church *v.* Oliver St. Church, 41 Superior Ct. (N. Y.) 369, 420.

[7] French *v.* Baron, 2 Atk. 120; Bonithon *v.* Hockmore, 1 Vern. 315; Godfrey *v.* Watson, 3 Atk. 518; Eaton *v.* Simonds, 14 Pick. (Mass.) 98; Clark *v.* Smith,

given for this rule is, that to allow such compensation would tend directly to facilitate usury and oppression.[1] And moreover the care he bestows is for the furtherance and protection of his own interests, being not an agent, but for the time, as it were, the owner.[2] But he may charge for the services of an agent employed by him to collect rents, when a prudent owner acting for himself would probably have done so.[3]

If a mortgagor agrees and consents, with a knowledge of all the facts and circumstances, to disbursements made by the mortgagee in possession, these are to be deemed reasonable and must be reimbursed; and the fact that the mortgagor or his agent agreed to the employment by the mortgagee for a time of a person to take charge of the mortgaged estate, at a certain rate of compensation, is competent though not conclusive evidence that the same compensation should be allowed during the residue of the term of the mortgagee's possession.[4]

1133. In Massachusetts, as a general rule, the mortgagee in possession is allowed as compensation for managing the property five per cent. of the rents collected, though if it were found that the services were actually worth more, the rule is not so fixed as to prevent a further allowance.[5] Therefore in a case where a master, in stating an account between the mortgagor and mortgagee, reported that he was satisfied that such commission would not compensate the mortgagee for his trouble, the court recommitted the report with directions to allow such further sum as he might think just and reasonable.[6] The question of compensation is peculiarly within the discretion of the master to whom the bill in equity is referred to state the account.[7] But the mortgagee cannot usually charge a commission on the amount expended in repairs and improvements. In Connecticut, also, a mortgagee in possession is entitled to charge for his services in renting them and

Saxt. (N. J.) 121, 137; Elmer *v.* Loper, 25 N. J. Eq. 475; Moore *v.* Cable, 1 Johns. (N. Y.) Ch. 385, 388.

[1] Scott *v.* Brest, 2 T. R. 238.

[2] Benham *v.* Rowe, 2 Cal. 387.

[3] Davis *v.* Dendy, 3 Mad. 170; Harper *v* Ely, 70 Ill. 581.

[4] Cazenove *v.* Cutler, 4 Met. (Mass.) 246.

[5] Gerrish *v.* Black, 104 Mass. 400; Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Tucker *v.* Buffum, 16 Pick. (Mass.) 46; Montague *v.* Boston & Albany R. R. Co. 124 Mass. 242.

[6] Adams *v.* Brown, 7 Cush. (Mass.) 220.

[7] Montague *v.* Boston & Albany R. R. Co. *supra.*

collecting rents, and for such sums as were necessarily expended to obtain possession of the property.[1]

In determining the amount of compensation to be made to the mortgagee, reference should be had to the nature and condition of the property and to the provisions made in the mortgage itself for such compensation.[2]

5. *Allowances for Disbursements.*

1134. Taxes paid by the mortgagee on the mortgaged premises, either before or after he has taken possession, must be repaid upon redemption. Under the provisions of the mortgage the taxes, when paid by him, usually become a lien under the mortgage.[3] But even when this is not the case, the payment being made to preserve his security he is entitled to recover the amount paid, and may even have a preference to this extent over prior incumbrancers whose liens the payment has served to protect.[4] The same is true of any assessment made by authority for public purposes, and which is by law a primary lien upon the property.[5]

There is no obligation resting upon a mortgagee to pay the taxes unless he be in possession of the land; and he is not therefore responsible to the mortgagor for the loss of the property through the non-payment of the taxes.[6]

1135. Insurance premiums. — Where it is part of the contract of the mortgagor, and a condition of the mortgage, that he shall keep the premises insured in a certain sum for the benefit of the mortgagee, charges for premiums paid by him for such insurance, which the mortgagor has neglected to obtain, are allowed,[7] though the insurance obtained be "for whom it may concern" and payable to the mortgagee.[8] But he is not allowed for premiums paid by him to insure his own interest as mortgagee where the amount recovered in case of loss would go to him for his sole benefit without extinguishing the mortgage debt *pro tanto*.[9] An assignee of

[1] Waterman *v.* Curtis, 26 Conn. 241.

[2] Boston & Worcester R. R. Co. *v.* Haven, 8 Allen (Mass.), 359.

[3] Robinson *v.* Ryan, 25 N. Y. 320; Burr *v.* Veeder, 3 Wend. (N. Y.) 412; Eagle Fire Ins. Co. *v.* Pell, 2 Edw. (N. Y.) 631; Harper *v.* Ely, 70 Ill. 581; Strong *v.* Blanchard, 4 Allen (Mass.), 538.

[4] Cook *v.* Kraft, 3 Lans. (N. Y.) 512; Davis *v.* Bean, 114 Mass. 360.

[5] Dale *v.* McEvers, 2 Cow. (N. Y.) 118; Rapelye *v.* Prince, 4 Hill (N. Y.), 119.

[6] Harvie *v.* Banks, 1 Rand. (Va.) 408.

[7] Harper *v.* Ely, 70 Ill. 581.

[8] Fowley *v.* Palmer, 5 Gray (Mass.), 549.

[9] Fowley *v.* Palmer, *supra*.

a mortgage containing such a provision for insurance has the same right as the mortgagee to claim allowance upon redemption of the mortgage for sums paid for insurance while the mortgagor neglected to insure.[1]

Unless there be a provision in the mortgage for insuring the property for the mortgagee's benefit, he is not generally allowed for premiums paid by him for such insurance.[2] When there is such a requirement, premiums for insurance taken in excess of the amount stipulated for in the mortgage will not be allowed.[3]

Insurance procured by the mortgagee is not chargeable to the mortgagor, unless it is procured at his request, or in accordance with a provision in the mortgage.[4]

1136. The amount of insurance recovered upon a policy upon the buildings standing upon the mortgaged premises, procured by the owner at his own expense but payable to the mortgagee in case of loss in pursuance of a provision of the mortgage, must be applied in reduction of the mortgage debt upon redemption, although the insurance company, upon paying the loss to the mortgagee, take from him an assignment of the mortgage and policy.[5]

1137. A mortgagee in possession who is compelled to pay a prior mortgage, in order to protect his title, has, as against the mortgagor and those claiming under him, a right to indemnify himself out of the mortgaged property.[6] And even if such prior mortgage is discharged of record before title accrued to the person seeking to redeem, instead of an assignment of it being made to the mortgagee who paid it, he is to be allowed for the sum so paid, especially if it appears that the whole amount claimed by the mortgagee is less than what appears to be due upon the mortgage by the record.[7]

A mortgagee who has advanced money to protect the property from injury or loss is held to have a good charge upon the property for the money so advanced.[8] Money paid by the mortgagee

[1] Montague *v.* Boston & Albany R. R. Co. 124 Mass. 242.

[2] Faure *v.* Winans, Hopk. (N. Y.) Ch. 283; but in Slee *v.* Manhattan Co. 1 Paige (N. Y.), 81, such an allowance was made under the peculiar circumstances of the case.

[3] Madison Av. Church *v.* Oliver St. Church, 41 Superior Ct. (N. Y.) 369.

[4] Bellamy *v.* Brickenden, 2 J. & H. 137; Dobson *v.* Land, 8 Hare, 216; Boston & Worcester R. R. *v.* Haven, 8 Allen (Mass.), 359; White *v.* Brown, 2 Cush. (Mass.) 412.

[5] Graves *v.* Hampden F. Ins. Co. 10 Allen (Mass.), 281.

[6] Harper *v.* Ely, 70 Ill. 581.

[7] Davis *v.* Winn, 2 Allen (Mass.), 111.

[8] Rowan *v.* Sharp's Rifle Manuf. Co. 29 Conn. 282.

to protect the title to the estate from prior incumbrances may be added by him to the principal of his claim, and he is entitled to interest upon the sum so paid.[1]

1138. The mortgagee should be credited for reasonable counsel fees paid in collecting rents and profits; but not for counsel fees, in suits between the mortgagee and mortgagor.[2]

A mortgagee who has paid a claim upon which he was surety of the mortgagor, and which the mortgage was given to secure, should be allowed the whole sum paid, although he has afterwards received contribution from a co-security.[3]

6. *Annual Rests.*

1139. Rule for annual rests in stating account. — Chief Justice Shaw,[4] in directing that an account be reformed by making annual rests, laid down the following rule: —

"1. State the gross rents received by the defendant to the end of the first year. 2. State the sums paid by him for repairs, taxes, and a commission for collecting the rents, and deduct the same from the gross rents, and the balance will show the net rents to the end of the year. 3. Compute the interest on the note for one year, and add it to the principal, and the aggregate will show the amount due thereon at the end of the year. 4. If the net annual rent exceeds the year's interest on the note deduct that rent from the amount due, and the balance will show the amount remaining due at the end of the year. 5. At the end of the second year go through the same process, taking the amount due at the beginning of the year as the new capital to compute the year's interest upon. So to the time of judgment."

Statements of substantially the same rule have frequently been made. The two essential points are: First, that when there is a surplus of receipts in any year above the interest then due, a rest shall be made, and the balance remaining after discharging the interest shall be applied to reduce the principal, so that the mortgage shall not continue to draw interest for the face of it, when in fact the mortgagee has in his hands money that should be ap-

[1] Godfrey *v.* Watson, 3 Atk. 517, 518; Sandon *v.* Hooper, 6 Beav. 248; Pelly *v.* Wathen, 7 Hare, 373; Davis *v.* Bean, 114 Mass. 360.

[2] Hubbard *v.* Shaw, 12 Allen (Mass.), 120; Boston & Worcester R. R. Co. *v.* Haven, 8 Allen (Mass.), 359.

[3] Strong *v.* Blanchard, 4 Allen (Mass.), 538.

[4] Van Vronker *v.* Eastman, 7 Met. (Mass.) 157.

plied to reduce the principal, and thereby make the interest less for the following year.

Secondly, although the amount received in any year be insufficient to pay the interest accrued, the surplus of interest must not be added to the principal to swell the amount on which interest shall be paid for the following year; for that would result in the charging of interest upon interest, which is not allowed; but the interest continues on the former principal until the receipts exceed the interest due. These are the principles upon which the mortgagee's interest account is everywhere made up; and the cases in which they are stated are many and in general accord.[1]

Except for the first part of the rule, that if the annual rents exceed the interest on the mortgage debt annual rests shall be made and interest allowed on the surplus, great injustice would be done in many cases.[2] If, for instance, the debt were $5,000 and the rents should be in excess of the interest, the amount of $500 each year, and no rests were made, the mortgagee might remain in possession ten years, with the entire mortgage debt drawing interest all the while, when in fact he had received $500 of the principal each year, and during the last year, while only $500 would remain due, he would receive the interest of ten times that sum.

1140. If the rents and profits exceed the sums properly chargeable for repairs and the care of the estate, so that there is a net surplus applicable to the payment of interest on the debt, annual rests in the computation of interest should be made.[3] Semi-annual rests have been allowed where the rents and profits received quarterly were sufficient to pay the interest.[4] But if there be nothing received from the property that is applicable from time to time to the payment of the accrued interest no rests

[1] Connecticut *v.* Jackson, 1 Johns. (N. Y.) Ch. 13, 17; Stone *v.* Seymour, 15 Wend. (N. Y.) 19, 24; Jencks *v.* Alexander, 11 Paige (N. Y.), 619, 625; French *v.* Kennedy, 7 Barb. (N. Y.) 452; Bennett *v.* Cook, 5 Thomp. & C. (N. Y.) 134; 2 Hun, 526; Snavely *v.* Pickle, 29 Gratt. (Va.) 27.

For exceptional cases in which annual rests are not required, see Patch *v.* Wild, 30 Beav. 100; Horlock *v.* Smith, 1 Coll. Ch. 287.

[2] Green *v.* Wescott, 13 Wis. 606; Shaeffer *v.* Chambers, 2 Halst. (N. J.) Eq. 548; Gordon *v.* Lewis, 2 Sum. 147; Shephard *v.* Elliot, 4 Madd. 254; Gibson *v.* Crehore, 5 Pick. 160; Reed *v.* Reed, 10 Pick. 398.

[3] Gladding *v.* Warner, 36 Vt. 54; Reed *v.* Reed, 10 Pick. (Mass.) 398; Green *v.* Wescott, 13 Wis. 606.

[4] Gibson *v.* Crehore, 5 Pick. (Mass.) 160.

can be made.[1] Annual rests are directed when the mortgagee is personally in possession as well as when he receives rents from a tenant.[2]

In taking the account between the mortgagee and mortgagor the surplus of his receipts over his disbursements should be applied to the payment of the interest as it becomes due; and if more than sufficient for that purpose the excess should be credited on the principal.[3] If in any year his disbursements exceeded his receipts, the amount of the deficit should be added to the principal of the debt. Annual rests may be made, so that the mortgagor may be charged with interest for disbursements made by the mortgagee, but not so as to charge the debtor with compound interest either upon the mortgage or upon the advances.[4] When there is interest in arrear at the time the mortgagee takes possession, annual rests are not generally required until the interest in arrear is paid off;[5] and according to some authorities they are not in such case required until the whole mortgage debt has been paid off.[6]

1141. As to the rate of interest, the contract of the parties will govern. If the rate reserved in the mortgage be less than the legal rate, it will continue at that rate until paid.[7] If, on the other hand, that rate be in excess of the rate allowed upon judgments and upon contracts when the parties have not fixed upon a different rate, it will continue at the same rate. Of course, if in either case the debt be merged in a judgment, the rate established by law for all cases when interest is implied will thereafter govern.

Where coupons have been given for the interest on the mortgage debt, they draw interest after maturity in the same manner as do notes for the principal. They provide for the payment of

[1] Reed *v.* Reed, 10 Pick. (Mass.) 398; Montague *v.* Boston & Albany R. R. Co. 124 Mass. 242.

[2] Wilson *v.* Metcalfe, 1 Russ. 530; Morris *v.* Islip, 20 Beav. 654.

[3] Shephard *v.* Elliot, 4 Madd. 254; Gould *v.* Tancred, 2 Atk. 533; Mahon *v.* Williams, 39 Ala. 202; Elmer *v.* Loper, 25 N. J. Eq. 475; Johnson *v.* Miller, 1 Wils. (Ind.) 416.

[4] Vanderhaise *v.* Hugues, 13 N. J. Eq. 410.

[5] Wilson *v.* Cluer, 3 Beav. 140.

[6] Latter *v.* Dashwood, 6 Sim. 462; Finch *v.* Brown, 3 Beav. 70; see, also, Morris *v.* Islip, 20 Beav. 654; Thorneycroft *v.* Crockett, 2 H. L. Ca. 239; Horlock *v.* Smith, 1 Coll. Ch. 287.

[7] Miller *v.* Burroughs, 4 Johns. (N Y.) Ch. 436.

definite sums of money at definite times, and are in effect promissory notes.[1]

Upon the redemption of a mortgage the mortgagor is not obliged to pay compound interest, though the mortgage note may in terms require it.[2] If the mortgage be assigned after the taking of possession, no rest in the computation of interest at that time, by adding the interest then due to the principal, should be made.[3]

1142. The account binds subsequent incumbrancers, though not privy to the taking of it, unless there be fraud or collusion. This is the case even with accounts settled between the mortgagor and mortgagee out of court.[4]

1143. An account may be opened for fraud or a particular error even after a long lapse of time.[5] The fraud or error must be particularly alleged; a general charge being sufficiently answered by a general denial.[6]

[1] Gelpcke *v.* City of Dubuque, 1 Wall. 206; Hollingsworth *v.* City of Detroit, 3 McLean, 472; Harper *v.* Ely, 70 Ill. 581; Dunlap *v.* Wiseman, 2 Dis. (Ohio) 398. See Jones on R. R. Securities, §§ 332–336.

[2] Parkhurst *v.* Cummings, 56 Me. 155; Stone *v.* Locke, 46 Me. 445.

[3] Boston Iron Co. *v.* King, 2 Cush. (Mass.) 400.

[4] Wrixon *v.* Vize, 2 Dru. & War. 192; Knight *v.* Bampfeild, 1 Vern. 179.

[5] Vernon *v.* Vawdry, 2 Atk. 119.

[6] Drew *v.* Power, 1 Sch. & Lef. 192; Kinsman *v.* Barker, 14 Ves. 579.

CHAPTER XXIV.

WHEN THE RIGHT TO REDEEM IS BARRED.

I. The statute of limitations applies by analogy, 1144–1151.
II. When the statute begins to run, 1152–1161.
III. What prevents the running of the statute, 1162–1173.

1. *The Statute of Limitations applies by Analogy.*

1144. In general, except when changed by modern statutes, the rule adopted by courts of equity in regard to the redemption of mortgages is in analogy with the right of entry at law, under the old statute of limitations, 21 Jac. 1, c. 16, that twenty years' possession by the mortgagee without any account or acknowledgment of a subsisting mortgage is a bar, unless the mortgagor is within some of the exceptions made for disabilities.[1] "Otherwise," said Lord Hardwicke, "it would make property very precarious, and a mortgagee would be no more than a bailiff to the mortgagor, and subject to an account, which would be a great hardship,"[2] In analogy to the same statute the same exceptions are made for disabilities, and ten years allowed after their removal

[1] "It is now perfectly settled," said Sir Wm. Grant, "that twenty years' possession by a mortgagee is *primâ facie* a bar to the right of redemption," in Barron *v.* Martin, 19 Ves. 327, and cases cited; Blake *v.* Foster, 2 Ball & Beat. 402; Johnson *v.* Mounsey, 40 L. T. N. S. 234; 7 Reporter, 701; Amory *v.* Lawrence, 3 Cliff. 523; Ayres *v.* Waite, 10 Cush. (Mass.) 72; Howland *v.* Shurtleff, 2 Met. 26; Slicer *v.* Bank of Pittsburg, 16 How. 571; Hughes *v.* Edwards, 9 Wheat. 489; Dexter *v.* Arnold, 1 Sumner, 109; Ross *v.* Norvell, 1 Wash. (Va.) 17; Bates *v.* Conrow, 11 N. J. Eq. (3 Stock.) 137; Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 129, where Chancellor Kent cites many cases; Moore *v.* Caple, 1 Ib. 385; Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48; Phillips *v.* Sinclair, 20 Me. 269; Cook *v.* Finkler, 9 Mich. 131; Gunn *v.* Brantley, 21 Ala. 633; Hallesy *v.* Jackson, 66 Ill. 139; McNair *v.* Lot, 34 Mo. 285; Montgomery *v.* Chadwick, 7 Iowa, 114; Rogan *v.* Walker, 1 Wis. 527; Knowlton *v.* Walker, 13 Wis. 264; Bailey *v.* Carter, 7 Ired. (N. C.) Eq. 282; Randall *v.* Bradley, 65 Me. 43; Blethen *v.* Dwinal, 35 Me. 556; Roberts *v.* Littlefield, 48 Me. 61; Hoffman *v.* Harrington, 33 Mich. 392; Hall *v.* Denckla, 28 Ark. 506; Crawford *v.* Taylor, 42 Iowa, 260.

[2] Anon. 3 Atk. 313.

within which the right may be asserted, at the expiration of which time the bar is complete.[1]

The right of the mortgagor to redeem being an equitable and not a legal right, the statute of limitations does not strictly constitute a bar to a bill to redeem; but equity adopts the statutory period of twenty years after forfeiture and possession taken by the mortgagee, beyond which the mortgagor shall not be allowed to redeem, if he has paid no interest in the mean time. Such lapse of time affords evidence of a presumption that the mortgagor has abandoned his right.[2] But no lapse of time less than twenty years is a sufficient answer to the mortgagor's bill to redeem where that is the time necessary to bar real actions;[3] and that is not a conclusive and absolute bar, but only affords a presumption of fact, which may be controlled by evidence.[4]

After the mortgagee has remained in possession for twenty years without accounting, or in any way acknowledging the right of redemption in the mortgagor, the latter cannot redeem.[5] The possession of the mortgagee must be unequivocally adverse to the mortgagor or person entitled to the equity of redemption. The fact that he entered with the consent of the owner makes his possession none the less adverse, unless in return he assumed some obligation to the owner.

But if the mortgagor was under disability the time of his disability is to be deducted, but he cannot avail himself of successive disabilities.[6] In analogy with the statute of limitations of Jac. 1, and generally adopted in this country, ten years is allowed after the removal of the disability within which to bring the action.[7]

1145. The time conforms to the statute in force. — In those states, however, in which the time of limitation within which a recovery of land may be had has been changed by statute to a period longer or shorter than twenty years, following the analogy of the statutes the time within which the mortgagor may

[1] Beckford *v.* Wade, 17 Ves. 99; Jenner *v.* Tracey, 3 P. Wms. 287, n.; Belch *v.* Harvey, Ib. 287, n.; White *v.* Ewer, 2 Vent. 340; Price *v.* Kopner, 1 S. & S. 347.

[2] Robinson *v.* Fife, 3 Ohio St. 551.

[3] Amory *v.* Lawrence, 3 Cliff. 523. For a brief statement of the limitation of real actions in the several states, see chapter xxvi, § 1193.

[4] Ayres *v.* Waite, 10 Cush. (Mass.) 72.

[5] Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 129; Limerick *v.* Voorhis, 9 Johns. (N. Y.) 129.

[6] Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 129.

[7] And see Lamar *v.* Jones, 3 Har. & M. (Md.) 328.

redeem from the mortgagee in possession will be the same; as, for instance, the statute of limitations in Connecticut prescribing fifteen years as the period beyond which an entry shall not be made, a mortgagor is there barred by the lapse of this period during which the mortgage title has not been recognized by the mortgagee in possession.[1] In a few states special statutes have been enacted with reference to the redemption of mortgages, and a synopsis of these statutes, and of the English statute upon which they are founded as well, is given in a note.[2]

[1] Jarvis *v.* Woodruff, 22 Conn. 548; Skinner *v.* Smith, 1 Day (Conn.), 124; Crittendon *v.* Brainard, 2 Root (Conn.), 485.

[2] **California**: An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage. If there is more than one such mortgagor or person claiming under him, and one is entitled to maintain the action and others are not so entitled, the person entitled may redeem a divided or undivided part of the mortgaged premises, according as his interest may appear, and have an accounting for a part of the rents and profits proportionate to his interest in the mortgaged premises, on payment of a part of the mortgage money, bearing the same proportion to the whole of such money as the value of his divided or undivided interest in the premises bears to the whole of such premises. Civil Code of Procedure, 1872, §§ 346, 347. **Kentucky**: After a mortgagee of real property, or any person claiming under him, has had fifteen years' continued adverse possession, no action shall be brought by the mortgagor, or any one claiming under him, to redeem it. G. S. 1873, c. 71, art. iv. § 16. **Mississippi**: When a mortgagee, after a forfeiture of the mortgage, has obtained actual possession, or receipt of the profits or rent of the land mortgaged, the mortgagor, or any person claiming through him, shall not bring suit to redeem but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the mean time an acknowledgement of the title of the mortgagor, or of his right of redemption, shall have been given in writing, signed by the mortgagee, or the person claiming through him; and in such case no suit shall be brought but within ten years next after the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given; but such acknowledgment shall be effectual only as against, and to the extent of the interest of, the party signing it. R. C. 1871, § 2149. **New Jersey**: If a mortgagee and those under him be in possession of the lands contained in the mortgage, or any part thereof, for twenty years after default of payment by the mortgagor, then the right or equity of redemption is forever barred. Rev. 1877, p. 507. **North Carolina**: An action for the redemption of a mortgage where the mortgagee has been in possession, or for a residuary interest under a deed of trust for creditors where the trustee, or those holding under him, has been in possession, must be brought within ten years after the right of action accrued. Battle's Revisal, 1873, p. 149.

The English Statute of 3 & 4 Will. 4, c. 27, § 28. — When a mortgagee shall have obtained possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through

1146. The right to foreclose and the right to redeem are reciprocal. — Since the rights of the mortgagor and mortgagee are reciprocal and commensurable, redemption under the mortgage is cut off at the expiration of the same time that the right to foreclose is barred.[1] In accordance with this maxim, it is held in California that in case the debt is foreclosed in four years the right to redeem is barred by the lapse of the same period.[2] In Iowa, also, an action to redeem is barred in ten years, the same time in which an action at law for the debt secured would be barred.[3] The same application of the principle is made in Minnesota, where in analogy to a statute specially providing that an ac-

him, shall not bring a suit to redeem the mortgage but within *twenty* years next after the time at which the mortgagee obtained such possession or receipt, unless, in the mean time, an acknowledgment in writing of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the person or persons signing as aforesaid, and those claiming any part of the mortgage money, or land, or rent, by, from, or under him or them, and persons entitled to any estate or interest to take effect after or in defeasance of his or their estate or interest; and shall not operate to give the mortgagor or mortgagors a right to redeem, as against the persons entitled to any other undivided or divided part of the money, land, or rent. And where such of the mortgagees or persons aforesaid as shall have given such acknowledgement shall be entitled to a divided part of the land or rent comprised in the mortgage, or some interest or estate therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment with interest of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

The Real Property Limitation Act, 1874, § 7, which goes into operation from and after January 1, 1879, is the same as the foregoing, except the time is made *twelve* years instead of *twenty*.

[1] King *v.* Meighen, 20 Minn. 264 Caufman *v.* Sayre, 2 B. Mon. 202; Koch *v.* Briggs, 14 Cal. 256; Grattan *v.* Wiggins, 23 Cal. 34; Cunningham *v.* Hawkins, 24 Cal. 410; Arrington *v.* Liscom, 34 Cal. 372; Lord *v.* Morris, 18 Cal. 482; Green *v.* Turner, 38 Iowa, 112, 116; Haskell *v.* Bailey, 22 Conn. 569.

[2] Cunningham *v.* Hawkins, *supra*.

[3] Smith *v.* Foster, 44 Iowa, 442; Crawford *v.* Taylor, 42 Iowa, 260; Gower *v.* Winchester, 33 Iowa, 303.

tion to foreclose shall be commenced within ten years after the cause of action accrues, redemption must be made within the same time.[1] Of course this principle cannot be applied where by statute, or by operation of judicial construction of the statute, a different time is fixed for redemption from that allowed for foreclosure, as in New York and Wisconsin.

1147. The right of redemption in New York and Wisconsin is barred in ten years. In the former state it is held that inasmuch as the statute of limitations, so far as it limits the recovery of the possession of real property to twenty years, does not apply to cases of which a court of equity has peculiar and exclusive jurisdiction, an action by a mortgagor for redemption or for an accounting and recovery of possession against a mortgagee in possession comes within the provision of the statute limiting the time for the commencement of actions not otherwise specified, and is thereby limited to ten years from the time the right of action accrues.[2] To a similar statute in Wisconsin the same construction is given.[3]

1148. In **Tennessee** it is held that the statute of limitations does not apply to a bill in equity to redeem a mortgage, because redemption can only be enforced in equity, and the statute does not apply to cases belonging to the exclusive jurisdiction of courts of equity. "But although equity does not permit the statute of limitations to be pleaded to the relief which it affords to the right of redemption, yet, in the application of that relief, it regards time and discountenances stale demands."[4] The court would

[1] Holton *v.* Meighen, 15 Minn. 80; King *v.* Meighen, 20 Minn. 264; Parsons *v.* Noggle, 23 Minn. 328.

[2] 4 Kent Com. p. 188; Hubbell *v.* Sibley, 50 N. Y. 468, affirming 5 Lans. (N. Y.) 51; Miner *v.* Beekman, 50 N. Y. 337; 14 Abb. (N. Y.) Pr. N. S. 1; Tibbs *v.* Morris, 44 Barb. (N. Y.) 146; Peabody *v.* Roberts, 47 Barb. (N. Y.) 102; Cleveland *v.* Boerum, 24 N. Y. 617. In Hubbell *v.* Sibley, *supra*, Mr. Justice Grover, delivering the opinion of the Court of Appeals, said: "It is further insisted by the counsel for the appellants that this should be held an action for the recovery of real property, for the reason that the plaintiffs might, before its commencement, have tendered the amount due, and thereby discharged the lien, and then commenced an action for the mere recovery of the possession of the land. It is a sufficient answer to this that this is not such an action, but an action for an accounting and the recovery of the possession upon payment of what shall be found due. This is a pure equitable remedy, and such as was given by courts of equity only while such courts had a separate existence. By giving this answer it is not intended to concede that such tender might have been made by the plaintiffs with the effect claimed."

[3] Cleveland Ins. Co. *v.* Reed, 24 How. 284; Knowlton *v.* Walker, 13 Wis. 264.

[4] Overton *v.* Bigelow, 3 Yerg. (Tenn.) 513.

doubtless adopt the period of twenty years as affording a presumption of right in the mortgagee, after analogy of the statute of limitations.[1] The possession of the mortgagee is consistent with the right of the mortgagor, unless it be continued long enough to afford such a presumption, which a shorter period than twenty years would not give. But if the mortgagee purchase an outstanding title, and hold it adversely to the mortgagor with his knowledge, the statute which makes seven years' adverse possession a bar to an action to recover will run in the mortgagee's favor, and will perfect the title in him.[2]

1149. The mortgagee's possession must be adverse during the whole period, and therefore if, at the time of his entry, he is entitled to an interest in the equity of redemption, or if he subsequently acquires such an interest, as, for instance, a tenancy for life, he loses the benefit of the statute.[3] Time will not run in his favor so long as his interest in the equity of redemption continues.

1150. The mortgagee's possession, when adverse, operates equally against a married woman who has made the mortgage. She is in no way protected by her coverture from the effect of the adverse possession of the mortgagee. The adverse possession is against the equitable right of the mortgagor to redeem, and the limitation is an equitable one in analogy to the statute of limitations at law; and it is regarded as equitable that a wife should lose her right in equity to redeem when there has been such a lapse of time as would in equity bar any other mortgagor. The privileges and exemptions of married women should be curtailed as their separate rights in regard to their property are recognized. Having voluntarily placed herself in the position of a mortgagor she must accept the usual incidents of the position, and her equitable right to redeem is lost when there has been such a lapse of time as would bar the right of any other mortgagor.[4]

[1] In Yarbrough *v.* Newell, 10 Yerg. 376, the court, in affirming the doctrine laid down in Overton *v.* Bigelow, say: "In those states of the Union where the time fixed by the statute of limitations is twenty years, the courts of equity have taken the same time 'as the presumption of right' in a mortgagee. But we know of no case, either in this state or any of the other states, where the statute of limitations is for a shorter period, that the courts of equity have reduced the time within which a mortgage may be redeemed to that period."

[2] Gudger *v.* Barnes, 4 Heisk. (Tenn.) 570; Wallen *v.* Huff, 5 Humph. (Tenn.) 91, 94.

[3] Hyde *v.* Dallaway, 2 Hare, 528; Raffety *v.* King, 1 Keen, 601.

[4] Hanford *v.* Fitch, 41 Conn. 486.

1151. Successive disabilities of mortgagor. — To entitle the mortgagor to the benefit of a disability, it must be one that existed at the time the right to redeem first accrued; and though if several disabilities existed together, the statute does not begin to run until the party entitled to redeem has survived all of them, yet successive or cumulative disabilities are not allowed. "If disability could be added to disability," says Chancellor Kent, "claims might be protracted to an indefinite extent;"[1] and he quotes an expression of Lord Eldon, that "a right might travel through minorities for two centuries."

2. *When the Statute begins to run.*

1152. So long as the relation of mortgagor and mortgagee exists the statute does not commence to run in favor of either the mortgagor or the mortgagee.[2] That relation must be terminated in some way before either party in possession can interpose the statute as a defence against the other. As against the mortgagor this relation is generally terminated when the mortgagee, after a breach of the condition, enters and holds possession of the mortgaged property. Such possession, whether it be for the purpose of receiving the rents and profits, or for the purpose of foreclosure,[3] or for the purpose of wresting the property from the mortgagor, is equally effectual. When, however, by the terms of the mortgage, or by subsequent agreement, the mortgagee is to take and hold possession of the property until he shall satisfy his claim from the rents and profits, his possession does not become adverse until his demand has been satisfied from this source, or he asserts an absolute title in himself, and gives distinct notice of it to the mortgagor.[4]

[1] Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 139, and numerous cases cited.

The disabilities of the mortgagee which may give him an extension of time are limited by the English statute to the extreme period of forty years in all, under Stat. 3 & 4 Wm. 4, c. 27, §§ 16, 17, and to thirty years, under Stat. 37 & 38 Vict. c. 57. Much doubt had been entertained as to the effect of successive disabilities under the former statute until the case of Borrows *v.* Ellison, L. R. 6 Ex. 128, where it was decided that when the causes of disability overlap, the disability continues subject to the extreme limitation provided.

[2] Waldo *v.* Rice, 14 Wis. 286; Green *v.* Turner, 38 Iowa, 112, 118; Crawford *v.* Taylor, 42 Iowa, 260; and see Humphrey *v.* Hurd, 26 Mich. 44; Rockwell *v.* Servant, 66 Ill. 424.

[3] Montgomery *v.* Chadwick, 7 Iowa, 114; Bailey *v.* Carter, 7 Ired. (N. C.) Eq. 282.

[4] Anding *v.* Dadis, 38 Miss. 574; Kohl-

1153. As to a Welsh mortgage. — A mortgage containing such an agreement is in the nature of a Welsh mortgage, and from the very nature of the agreement it is constantly renewed by the receipt of the rents and profits in payment of interest or in discharge of the debt. The mortgagee's possession is of the essence of the contract; he holds the estate subject to perpetual account.[1] Time will not bar the mortgagor, unless the mortgagee disclaims the mortgage and gives him notice in effect that he holds in defiance of his title; or a sufficient length of time to constitute a bar has elapsed since the principal and interest of the mortgage has been paid from the rents and profits.[2] The mortgagor could in equity, doubtless, compel an account, which would show when the mortgage was paid.[3]

1154. The mortgagee's possession runs against those entitled to the estate in remainder as well as against the tenant for life, and if his possession has continued for twenty years before the title of the remainder-man accrued, the bar is as effectual against him as it was against the life-tenant, who had the immediate right to redeem during the whole period of his possession.[4] The rule is the same in case the tenancy during the possession was by the curtesy,[5] or by right of dower.[6]

1155. If the mortgagor retains possession of a part of the mortgaged premises, though the mortgagee be in possession of the remainder, no lapse of time will bar the right of redemption of the entire estate.[7] The right existing as to any part, it must exist as to the whole, for as a general rule there can be no redemption of separate parts. If the mortgagor has constructive possession, as when the mortgagee has entered under a lease, or an agreement amounting equitably to a lease, the statute will not

heim *v.* Harrison, 34 Miss. 457; Frink *v.* Le Roy, 49 Cal. 314; and see Quint *v.* Little, 4 Me. 495.

[1] Fenwick *v.* Reed, 1 Mer. 114; Orde *v.* Heming, 1 Vern. 418; Balfe *v.* Lord, 2 D. & W. 480; Morgan *v.* Morgan, 10 Ga. 297; Marks *v.* Pell, 1 Johns. (N. Y.) Ch. 594. So under an arrangement for repayment by annuities. Teulon *v.* Curtis, 1 Younge, 616.

[2] Yates *v.* Hambly, 2 Atk. 360; Longuet *v.* Scawen, 1 Ves. Sen. 403; Alderson *v.* White, 2 De G. & J. 97; Talbot *v.* Braddil, 1 Vern. 395; Lawley *v.* Hooper, 3 Atk. 280; Fenwick *v.* Reed, 1 Mer. 115.

[3] Fulthorpe *v.* Foster, 1 Vern. 477.

[4] Harrison *v.* Hollins, 1 Sim. & St. 471; Ashton *v.* Milne, 6 Sim. 369; Dallas *v.* Floyd, Ib. 379.

[5] Anon. 2 Atk. 333.

[6] Lockwood *v.* Lockwood, 1 Day (Conn.), 295.

[7] Burke *v.* Lynch, 2 Ba. & Be. 426; Rakestraw *v.* Brewer, Sel. Ca. in Ch. 56.

begin to run against the right of redemption until the mortgagee ceases to hold under such lease.[1]

It may happen, however, that a part of an estate may become irredeemable while the right of redemption is not lost as to the residue.[2]

1156. Cause of action accrues when mortgagee enters. — The cause of action against the mortgagee does not accrue when the money secured by the mortgage becomes due, but only when the mortgagee enters into possession.[3] Until then the plaintiff has no occasion for this remedy to regain possession. The possession may be explained, so that it is not so much the possession itself as the nature of it that operates as a bar to the right to redeem; but the presumption is that the possession is adverse after an entry upon a default in the mortgage. When the mortgagee has entered, not as mortgagee only, but by virtue of having a limited interest in the equity of redemption, as, for instance, a life estate, it is held that time will not run in his favor during the continuance of that interest, for it would be his duty to keep down the interest on his mortgage in favor of the remaindermen.[4]

As against the owner of the equity of redemption, the statute does not begin to run until the mortgagee takes actual and open possession of the mortgaged premises; and it does not begin then if he holds merely under his mortgage title and recognizes the mortgagor's right of redemption.[5]

1157. After twenty years' possession by the mortgagee it lies with the mortgagor to show that the effect is not a bar of his right of redemption. "The *onus* lies on the mortgagor to show that fact, in order to defeat the effect of the possession."[6] The presumption is that the right of redemption is gone after the

[1] Archbold *v.* Scully, 9 H. L. 360; Drummond *v.* Sant, 6 L. R. Q. B. 763.

[2] Lake *v.* Thomas, 3 Ves. Jun. 17.

[3] Hubbell *v.* Sibley, 50 N. Y. 468; Peabody *v.* Roberts, 47 Barb. (N. Y.) 91; Miner *v.* Beekman, 50 N. Y. 337; 14 Abb. Pr. N. S. 1; Knowlton *v.* Walker, 13 Wis. 264; Waldo *v.* Rice, 14 Wis. 286.

In Miner *v.* Beekman, *supra*, it was suggested that perhaps the cause of action does not accrue so long as the mortgagee continues in possession avowedly as mortgagee, without claiming in fee or by any other title; but as in that case the mortgagee claimed by a foreclosure title, there was no occasion for deciding this point.

[4] Story's Eq. Jur. § 1028; Reeve *v.* Hicks, 2 S. & S. 403; Raffety *v.* King, 1 Keen, 601, 618; Seagram *v.* Knight, L. R. 2 Ch. 632, per Chelmsford, L. C.

[5] Knowlton *v.* Walker, 13 Wis. 264; Waldo *v.* Rice, 24 Wis. 286.

[6] Per Sir Wm. Grant in Barron *v.* Martin, 19 Ves. 326.

mortgagee's possession has continued for this period of time. But any act done, or acknowledgment made by him in the mean time, evincing his recognition of the mortgage as such, may be offered to repel this presumption. Although possession by the mortgagee has continued long enough to give him presumptive title, the nature of his possession is what really determines the rights of the parties, and a great variety of facts and circumstances may be adduced to show it is by virtue of the mortgage only, and consequently does not bar the right to redeem.[1]

A bill to redeem which shows that the mortgagee has been in possession for twenty years or more must distinctly aver the grounds upon which the possession does not constitute a bar. A bill brought thirty-four years after the maturity of the mortgage, which averred that the mortgagee's possession was not continuous and adverse for the period of twenty years, but did not aver that the possession was taken within that period, and gave no excuse for the delay in bringing the bill, was dismissed, because the averments were too uncertain to found a right to redeem upon.[2]

1158. Mere constructive possession by the mortgagee for twenty years will not raise a presumption that the title has become absolute in him; and the fact that the mortgaged premises were wild, uncleared lands will not avail a mortgagee as against the mortgagor, although the former has the legal title, and the courts have adopted a rule as to such lands that the possession follows the right; for the purpose of the rule is to protect the owner of such lands from intrusion and trespass.[3] Nothing short of actual possession by the mortgagee continued for the time required by statute, without accounting or admitting that he is merely a mortgagee, but under a claim of absolute ownership, will avail to convert his mortgage title into a title absolute in equity.[4] Payment of taxes on wild land will not avail.[5] An occasional occupation of the premises will not avail. The occupation must be a continuous and notorious one, adverse to the right to redeem.[6] A conveyance by the mortgagee purporting to give an absolute title to the mortgaged property does not work a disseisin of the

[1] Robinson *v.* Fife, 3 Ohio St. 551.

[2] Reynolds *v.* Green, 10 Mich. 355.

[3] Moore *v.* Cable, 1 Johns. (N. Y.) Ch. 387; Slee *v.* Manhattan, 1 Paige (N. Y.), 48.

[4] Miner *v.* Beekman, 50 N. Y. 337; Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 129.

[5] Bollinger *v.* Chouteau, 20 Mo. 89.

[6] Humphrey *v.* Hurd, 29 Mich. 44.

mortgagor, but passes only the mortgage title.[1] Nor does an absolute conveyance of a portion of the mortgaged premises by the mortgagor while the mortgagee is in possession disseise him or interrupt his possession. "Possession in the mortgagee must at its commencement have been taken under the engagement which equity always implies, to account as a bailiff for the rents and profits with the mortgagor, and to apply them to the discharge of the mortgage debt. If this be not punctually and regularly done, and the account fairly and properly kept by the mortgagee, it is a violation of the implied engagement under which he holds the possession. The possession is all along consistent with the equitable title of the mortgagor, who may be disabled by poverty and distress to enforce the account and redemption. Yet such is the prevalence of analogy in equity, that even under such circumstances the possession of the mortgagee for twenty years, without a recognition of the mortgage title, or any account kept upon the footing of it, becomes a subject of equitable bar to redemption, notwithstanding a clear title to redemption in the one party, and on the other a continued misapplication of the rents and profits of the estate committed to his care, contrary to his engagement, and a continued breach of duty from the beginning to the end of the period, in omitting to keep the account."[2] But if for twenty years the mortgagor has paid neither principal nor interest, and there have been no dealings between him and the mortgagee, there is presumptive evidence of foreclosure.[3]

1159. After a mortgagee in possession has received payment of the debt, he really holds the property in trust for the mortgagor, and the statute of limitations will not run in his favor until by some further act he shows that his possession and claim have become adverse. This rule is equally applicable to the case of an absolute deed given to secure a debt and treated by the law as a mortgage.[4] The statute does not begin to run against the right to redeem such a mortgage until a tender and refusal of the money secured by it;[5] or at least until the mortgagee denies the right of the mortgagor to redeem and the mortgagor has actual

[1] Humphrey *v.* Hurd, 29 Mich. 44; Dexter *v.* Arnold, 2 Sumner, 108; Daniels *v.* Mowry, 1 R. I. 151.

[2] Cholmondeley *v.* Clinton, 2 Jac. & W. 187, per Sir Thomas Plumer, Master of the Rolls.

[3] Hurd *v.* Coleman, 42 Me. 182; Blethen *v.* Dwinal, 35 Me. 556; Phillips *v.* Sinclair, 20 Me. 269.

[4] Green *v.* Turner, 38 Iowa, 112.

[5] Wilson *v.* Richards, 1 Neb. 342.

notice of such denial, or of the mortgagee's adverse holding, as in cases where the mortgagee has entered under an agreement to account for the rents.[1]

The possession of a mortgagee after he has received payment of the debt will not be regarded as a holding adversely to the mortgagor, unless some act other than mere possession under the mortgage be shown to establish the adverse character of his possession. After payment he holds the premises for the mortgagor as a trustee.[2]

1160. The right to redeem a junior mortgage accrues at its maturity, so that the statute of limitations then begins to run against it; though it has been suggested that it may begin to run upon the maturity of the prior mortgage.[3]

The right of a remainder-man to redeem from a mortgagee in possession under the owner of the precedent estate does not begin to run until that estate is terminated.[4]

1161. After a foreclosure sale the statute runs from the expiration of the year of redemption. Where a purchaser under a foreclosure sale relied upon the statute of limitations to sustain his title against redemption by the mortgagor, it appeared that the suit to redeem was commenced about twenty-one years after the recovery of judgment in the foreclosure suit and the sale under it; but a little less than twenty years from the time the purchaser was entitled to a deed of the land, one year being allowed by law after the sale for redemption. It was held, however, that the suit to redeem was seasonably brought, because the mortgagor was entitled to the possession during the year without any liability to account for the rents and profits, and the purchaser in the mean time had only a certificate of purchase, and no legal title or right to the property vested in him until he received a deed from the officer after the expiration of the year. The mere recovery of judgment did not terminate the relation of mortgagor and mortgagee, and during the year allowed for redemption the mortgage remained a lien upon the premises.[5]

[1] Yarbrough *v.* Newell, 10 Yerg. (Tenn.) 376; Hammonds *v.* Hopkins, 3 Ib. 525.

[2] Green *v.* Turner, 38 Iowa, 112.

[3] Gower *v.* Winchester, 33 Iowa, 303.

[4] Fogal *v.* Pirro, 17 Abb. (N. Y.) Pr. 113; 10 Bosw. 100.

[5] Rockwell *v.* Servant, 63 Ill. 424.

3. *What prevents the Running of the Statute.*

1162. An acknowledgment will not be inferred from equivocal expressions. A mortgagee, in answer to a letter written him by the solicitor of a subsequent incumbrancer, replied by letter, saying: "I deny, though with all due courtesy, the claim of your client. I need only add that, if he were entitled to the account, it would be of no use, as the rents and profits of the estate have never been sufficient to pay the interest of the first charge." It was contended that by this letter he acknowledged that he held under a mortgage title, and that this was all that was necessary; but the Master of the Rolls said that this view was a misapprehension of what is required in an admission, which must be, not that the mortgagee holds under a mortgage title, but that some one has the right to redeem. "This letter, beginning as it did with an express denial of the plaintiff's claim, could not be treated as an acknowledgment of his right to redeem. If this were so, no one could safely answer a solicitor's letter except to say that he refused to give any reply." [1]

1163. An acknowledgment made after the expiration of the twenty years by the mortgagee while in possession has the same effect as one made before, not only as against himself, but also as against all persons claiming under him, or claiming an estate in remainder.[2] "If his admission had any effect at all, it must have restored the original character of the mortgage, and must have given to those entitled to redeem the right of recovering the legal estate on payment to him of the mortgage money in his character of executor." [3] But it is said that after the twenty years have passed stronger words and acts are required to constitute an admission of the right of redemption than would have been requisite while the mortgagor clearly had this right.[4]

1164. Acknowledgment to a third person. — Except as required by recent statutes, an acknowledgment of the mortgage as

[1] Thompson *v.* Bowyer, 9 Jur. N. S. 863; 11 W. R. 975.

The Master of Rolls, Lord Romilly, declared the authorities on the question, what constitutes a sufficient acknowledgment, to be difficult to reconcile.

[2] Pendleton *v.* Routh, 1 Giff. 35; 1 De G., F. & Jo. 81; Stansfield *v.* Hobson, 3 De G., Mac. & G. 620; 16 Beav. 236.

This rule applies since the passing of the Statute of Will. 4 as well as before.

[3] Per Sir John Stuart, Vice-Chancellor, in Pendleton *v.* Routh, 1 Giff. 35.

[4] Whiting *v.* White, Coop. 1; 2 Cox, 290; Barron *v.* Martin, Coop. 189.

a subsisting security would operate to keep the right of redemption open, although not made to the mortgagor, but in transactions with other persons, and to which the mortgagor was a stranger, as in an assignment or deed to a third person. In England, since the Statute of 3 & 4 Will. 4, c. 27, the admission must be made to the mortgagor himself,[1] or to his agent,[2] though this requirement has been the subject of some criticism.[3] An assignment of the mortgage subject to redemption is then no longer a sufficient acknowledgment, because the assignee is not a claimant of the mortgagor's estate, but of the mortgagee's ;[4] unless, however, the mortgagor or one claiming under him be made a party to the assignment, when the requirement would be answered.[5]

1165. **The mortgagee's acknowledgment is binding upon all who hold under him,** as, for instance, his lessee.[6] And so persons claiming in remainder under the mortgagee's will are bound by an admission of the mortgage title, made by his devisee in tail subject to remainders over, by a purchase of the title of the owners of the equity of redemption, notwithstanding they had been out of possession more than thirty years prior to the mortgagee's death: their title was revived by the acknowledgment, and the tenant in tail by means of it acquired the absolute ownership as against the devisees in remainder.[7]

1166. **By rendering an account.** — There are many cases in which it has been held that the rendering by the mortgagee of an account of the amount due upon the mortgage within twenty years after his entry does away with the presumption of title in him, and lets the mortgagor in to redeem.[8] Whether accounts kept by the mortgagee in his own books would have this effect without some communication on the subject to the mortgagor may well be doubted.[9] Accounts kept by the mortgagee's agent, and delivered to the mortgagor without authority, are held not to have

[1] Lucas *v.* Dennison, 13 Sim. 584.

[2] Trulock *v.* Robey, 12 Sim. 402 ; 2 Ph. 396.

[3] Stansfield *v.* Hobson, 3 De G., Mac. & G. 620.

[4] Lucas *v.* Dennison, 13 Sim. 584.

[5] Batchelor *v.* Middleton, 6 Hare, 75.

[6] Ball *v.* Lord Riversdale, Beat. 550.

[7] Pendleton *v.* Routh, 1 De G., F & Jo. 81 ; 1 Giff. 35 ; 5 Jur. N. S. 840 ; 6 Ib. 182.

[8] Edsell *v.* Buchanan, 2 Ves. Jun. 83, and cases cited ; Proctor *v.* Cowper, 2 Vern. 277 ; Anon. 2 Atk. 333 ; Hordle *v.* Healey, 1 Madd. 181.

[9] Barron *v.* Martin, 19 Ves. 327 ; Fairfax *v.* Montague, cited 2 Ves. Jun. 84 ; Campbell *v.* Beckford, cited 4 Ves. 474 ; Lake *v.* Thomas, 3 Ves. 17, 22 ; Hansard *v.* Hardy, 18 Ves. 455 ; Price *v.* Copner, 1 S. & S. 347.

this effect.[1] Under statutes requiring the acknowledgment to be made to the mortgagor or his agent, it would seem to be clear that a mortgagee's account of rents received by him would not have the effect of defeating the bar created by his possession unless communicated in writing directly to the mortgagor or his agent.[2]

1167. Acknowledgment by letter. — An acknowledgment by a mortgagee in the way of a letter written by him to the mortgagor or his solicitor is sufficient.[3] A mortgagee having been in possession more than twenty years, the solicitor of the mortgagor wrote to him requesting to know where he could see him upon the subject of the mortgage. The mortgagee replied by letter, saying, "I do not see the use of a meeting either here or at Manchester, unless some party is ready with the money to pay me off." It was held that this was a sufficient acknowledgment by the mortgagee that he held a redeemable estate in the property to exclude the application of the statute of limitations.

1168. Acknowledgment may be made by an assignment of the mortgage as security for a debt, or by any form of an assignment which treats the mortgage as redeemable.[4] It does not matter that the mortgagor is not a party to the transaction.

Now under the English statute, however, an assignment of a mortgage subject to the equity of redemption is not a sufficient acknowledgment to make the estate redeemable, because it is not an acknowledgment made to the party entitled to the equity of redemption.[5] But aside from this requirement, such an assign-

[1] Barron *v.* Martin, 9 Coop. 189.

[2] See Baker *v.* Wetton, 14 Sim. 426; Richardson *v.* Young, L. R. 10 Eq. 297.

[3] Stansfield *v.* Hobson, 3 De G., M. & G. 620; 16 Beav. 236. It was contended in this case that the right of redemption was not acknowledged to any particular person in accordance with the Statute 3 & 4 Will. 4, c. 27, § 28. See statute quoted § 1171. But the Lord Justice Knight Bruce said that the letter must be understood as acknowledging a title to redeem in the person on whose behalf the solicitor wrote.

It was also contended that the acknowledgment was conditional upon some one being ready to pay the money. "I think, however," said Lord Justice Turner, "that the letter could not mean that one was to be ready at the moment with the money, because accounts had to be taken, and the balance ascertained. The letter therefore appears to me to have left it open to the mortgagor to come to this court to have the balance ascertained upon the statement that he was ready to pay off the money."

[4] Hardy *v.* Reeves, 4 Ves. 466; Smart *v.* Hunt, Ib. 478, note; Borst *v.* Boyd, 3 Sandf. (N. Y.) Ch. 501.

[5] Lucas *v.* Dennison, 13 Sim. 584.

Upon this requirement of the statute Vice-Chancellor Wigram, in Batchelor *v.* Middleton, 6 Hare, 75, remarked: "Why, however, the mortgagee should not be allowed to make an admission (in writing, signed by himself) of his mortgage title to a third person, of which the mortgagor

ment would be an acknowledgment of the mortgage title such as would make a renewal of it from that time.

1169. By recital in deed. — In like manner the recital of the mortgage in a deed by the mortgagee is a sufficient admission of it,[1] and so is the recital of it in his will, by which he directs a certain disposition of the money in case the mortgage should be redeemed.[2] But under a statute requiring the acknowledgment to be made to the mortgagor or his agent, a recital in a deed to a third person or in a will is insufficient.[3]

1170. The mortgagee recognizes the mortgage as a subsisting lien by commencing proceedings to foreclose it, either by action or by advertisement, and the mortgagor may thereafter, within twenty years, file a bill for redemption and for an account of the rents and profits.[4] Such too is the effect of proceedings taken meanwhile to enforce the mortgage debt, although they be irregular and ineffectual.[5] It would be wholly inconsistent for the mortgagee to claim that there is no right of redemption after he has undertaken by such proceedings to bar such a right. The giving of notice under a power of sale, or under a statute regulating foreclosure by advertisement, is an admission of a right to redeem. This is in effect an invitation to the owner of the equity of redemption to pay the amount of the debt and redeem the estate, if he so chooses; and the mortgagee cannot object if he accepts the invitation.[6]

The acknowledgment may also be found in an answer to a suit in equity.[7]

1171. A verbal acknowledgment of the mortgage as a subsisting security is sufficient to prevent the possession from operating as a bar if the evidence be clear and unequivocal.[8] Lord Al-

may have the benefit, I do not know; but the statute requires that the admission should be made to the mortgagor himself, and by that I am bound."

[1] Hansard *v.* Hardy, 18 Ves. 455.

[2] Ord *v.* Smith, Sel. Cas. in Ch. 9; 2 Eq. Ca. Ab. 600.

[3] Lucas *v.* Dennison, 13 Sim. 584.

[4] Robinson *v.* Fife, 3 Ohio St. 551; Calkins *v.* Calkins, 3 Barb. (N. Y.) 305. In this case the mortgagee had been in possession almost twenty years prior to the proceeding to foreclose.

[5] Jackson *v.* De Lancey, 11 Johns. (N. Y.) 365; aff'd 13 Ib. 537; Cutts *v.* York Manuf. Co. 18 Me. 140.

[6] Calkins *v.* Isbell, 20 N. Y. 147; aff'g 3 Barb. 305; Jackson *v.* Slater, 5 Wend. (N. Y.) 295.

[7] Goode *v.* Job, 1 Ell. & Ell. 6.

[8] Reeks *v.* Postlethwaite, Coop. Eq. 160; Lake *v.* Thomas, 3 Ves. 17; Barron *v.* Martin, 19 Ves. 327; Perry *v.* Marston, 2 Bro. Ch. 397, per Lord Thurlow; Marks *v.* Pell, 1 Johns. (N. Y.) Ch. 594. Such acknowledgments, says Chancellor Kent,

vanley, commenting upon the admissibility of such evidence, said: "I cannot help thinking that it would have been a very wise rule if no parol evidence had been admitted upon these subjects."[1] Mr. Justice Story, quoting this opinion with approval, says: "Such admissions and acknowledgments are certainly open to the strong objection, that they are easily fabricated, and difficult, if not impossible, to be disproved in many cases, and that they have a direct tendency to shake the security of all titles under mortgages, even after a very long, exclusive possession by the mortgagee; nay, even after the possession of a half century."[2]

The objections to such evidence, however, are so great that the modern statutes of limitation in England provide not only that an acknowledgment, to be effectual as a recognition of the mortgage, must be in writing, signed by the mortgagee or the person claiming through him; but also that it must be made to the mortgagor, or some person claiming his estate, or to his agent.[3] If the writing complies with these conditions no particular form is required under this statute. The amount due need not be stated.[4] An acknowledgment by one of several mortgagees is binding only upon himself and those claiming under him, and enables the mortgagor to redeem only his estate or interest in the property.[5] This provision applies only to mortgagees holding interests in severalty, and not as joint-tenants. An acknowledgment by one joint mortgagee who is a trustee is entirely inoperative; all must join in it to take the case out of the statute.[6]

"are generally a dangerous species of evidence." See, also, Morgan *v.* Morgan, 10 Ga. 297, 304.

[1] Whiting *v.* White, 2 Cox, 290, 300; Cooper Eq. 1.

[2] In Dexter *v.* Arnold, 3 Sum. 152, 160. "I have not in my researches," says Judge Story, "found any other cases upon the point. And, what is very remarkable, there is no instance of a decree being made upon such parol evidence in favor of the party seeking to redeem. In the present case I am spared the necessity of deciding the general principle."

[3] Under Statute 3 & 4 Wm. 4, c. 27, § 28, "an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee or the person claiming through him."

[4] Stansfield *v.* Hobson, 16 Beav. 236; 3 De G., Mac. & G. 620; Trulock *v.* Robey, 12 Sim. 402; 2 Ph. 396; Lord St. John *v.* Boughton, 9 Sim. 219.

[5] See Statute quoted § **1146.**

[6] Richardson *v.* Younge, L. R. 10 Eq. 275; 6 Ch. App. 478. The views of the question presented in this case, in argument upon appeal, were: 1. That the acknowledgment of one trustee bound both. 2. That it bound a half interest, and enabled the mortgagor to redeem half of the estate upon paying half the debt. 3. That it bound neither. "It appears to me,"

1172. The filing of a bill to redeem stops the running of the statute. A mere demand by the mortgagor or the owner of the equity of redemption to be allowed to redeem does not prevent the running of the statute,[1] unless accompanied by a tender of the amount due upon the mortgage, as provided by statute in some states, and followed by a suit within a year or other specified time. The commencement of a suit to redeem is sufficient to save the right against the statute although the bill be filed merely, without any service of it, before the expiration of the twenty years' possession. The filing of the bill is the commencement of the suit.[2] But the plaintiff may, by unwarranted delay in the prosecution of the suit, lose all benefit of it.[3]

1173. The statute of limitations must be pleaded in order to secure the protection of it.[4] It may be pleaded by answer as a defence,[5] or in case it appears on the face of the plaintiff's bill that the mortgagee has been in possession for twenty years, without acknowledgment of the mortgage title, by demurrer.[6] But such possession must appear by dates positively stated, and not to be made out by inference, or argument,[7] or presumption.[8]

said Lord Justice James, in giving judgment, "to be the best construction of this involved and difficult section, to hold that the provisions as to acknowledgment by some of several trustees apply only where they have separate interests, either in the money or the land. I do not think Mr. Wilson had any separate interest either in the money or the land. He was simply joint-tenant with his co-trustee of the land, and jointly entitled with him to the mortgage money. Had the mortgagees not been trustees, the case would have stood very differently, for they must, almost of necessity, have been entitled to some distinct interests in the mortgage money; and if they had been partners, difficult questions might have arisen; but in the present case, which is simply that of trustees, I agree with the conclusion of the Vice-Chancellor."

[1] Hodle *v.* Healey, 1 Ves. & B. 536.

[2] Van Vronker *v.* Eastman, 7 Met. (Mass.) 157.

[3] Forster *v.* Thompson, 4 Dru. & War. 303; Boyd *v.* Higginson, 3 Ib. 123; Coppin *v.* Gray, 1 Y. & C. C. C. 205.

[4] Fordham *v.* Wallis, 10 Hare, 231; 17 Jur. 228.

[5] Batchelor *v.* Middleton, 6 Hare, 75; Adams *v.* Barry, 2 Coll. 285; Aggas *v.* Pickerell, 3 Atk. 225.

[6] Foster *v.* Hodgson, 19 Ves. 180; Hoare *v.* Peck, 6 Sim. 51; Baker *v.* Wetton, 14 Sim. 426; Jenner *v.* Tracy, 3 P. Wms. 287, *n.*

[7] Edsell *v.* Buchanan, 2 Ves. Jun. 82; 4 Bro. C. C. 254.

[8] Baker *v.* Wetton, 14 Sim. 426; Green *v.* Nicholls, 4 L. J. Ch. 118.

CHAPTER XXV.

WHEN THE RIGHT TO ENFORCE A MORTGAGE ACCRUES, 1174–1191.

1174. In general the right of action accrues upon the non-payment of the principal or interest at the time fixed for payment.[1] If it be shown by agreement of the parties at the time of the execution of a bond payable on demand, that it was not to be paid till a future specified time, the statute of limitations will be considered as beginning to run only from the time agreed upon for payment.[2] If no time of payment is fixed, the debt is payable on demand, and the right to enforce it accrues immediately. And so if by the express terms of the mortgage the debt is payable on demand, the mortgagee may foreclose by suit at any time without a previous demand other than the commencement of the suit.[3]

A mortgage cannot be foreclosed before it is due or there is a breach of some condition, although in a suit to foreclose a subsequent mortgage on the same property the holder of the prior mortgage not yet due is made a party defendant, and he files a cross-bill asking the foreclosure of his mortgage. The subsequent mortgage must be foreclosed by a sale, subject to the lien of the prior mortgage. The whole estate cannot be sold for the payment of both mortgages.[4]

1175. The right to foreclose may be made to depend upon events other than the lapse of time which generally determines the right; or the nature of the security may be such that an event not contemplated, or provided for by the parties, may give this right; as where the mortgage secured the fulfilment of an executory agreement which was to run for three years, and the insolvency of the mortgagor within that time put it out of his power to fulfil the agreement; and therefore this worked a

[1] Gladwyn *v.* Hitchman, 2 Vern. 134.
[2] Hale *v.* Pack, 10 W. Va. 145.
[3] Gillett *v.* Balcom, 6 Barb. (N. Y.) 370.
[4] Trayser *v.* Trustees of Indiana Asbury University, 39 Ind. 556.

breach of it and gave the mortgagee the right to foreclose immediately.[1]

Where a mortgage was given to secure certain promissory notes, conditioned, "that if any of the notes prove to be insolvent or worthless, the mortgage is to be good and valid, otherwise to be null and void," it was held that to constitute a breach some of the notes must prove worthless, or the makers insolvent. Non-payment alone did not constitute a breach.[2]

It is very generally provided by the terms of the mortgage that the mortgagee shall have the right to sell on the failure of the owner to pay the taxes assessed on the premises, and in such case a default in this particular gives the right to sell as effectually as when the default consists in the non-payment of the principal sum secured.[3] And so a condition in a mortgage, that in case the taxes upon the premises shall remain unpaid after a certain date in any year the whole debt shall become due, is equally binding and operative as a like condition in respect to the non-payment of any instalment of the principal or interest, and the court has no power to relieve the person in default from the consequences of it.[4] But where the mortgage merely provides that the mortgagor shall pay the taxes upon the premises, and in default of so doing that the mortgagee may discharge the same and collect them as a part of the mortgage debt, then the failure of the mortgagor to pay them is not such a default as will give the right to foreclose. And even if it be further provided that on default in the payment of the principal sum or interest, or of the taxes as provided, the mortgagee may sell, and out of the moneys arising from such sale retain the whole debt and interest, together with "such taxes and charges as shall have been paid by him," the right to sell on account of the taxes alone does not arise until the mortgagee has himself paid the taxes, because until then no money has become due which he is entitled to retain on a sale.[5]

1176. A failure to pay interest when due is a default within the meaning of a mortgage or trust deed which authorizes a sale to be made upon the happening of any default,[6] although the deed

[1] Harding *v.* Mill River Co. 34 Conn. 458.

[2] Fetrow *v.* Merriwether, 53 Ill. 275.

[3] Pope *v.* Durant, 26 Iowa, 233; Harrington *v.* Christie, 47 Iowa, 319.

[4] O'Connor *v.* Shipman, 48 How. (N. Y.) Pr. 126.

[5] Williams *v.* Townsend, 31 N. Y. 411.

[6] Stanhope *v.* Manners, 2 Eden, 197; Goodman *v.* Cin. & Chicago R. R. Co. 2 Disney (Ohio), 176; West Branch Bk. *v.*

does not show when the interest is payable or what the rate of it is, except by reference to the note secured.[1] In such case a subsequent purchaser of the mortgaged premises cannot insist that there was no power to sell for non-payment of such interest, because the mention of interest in the deed as reserved by the note is sufficient to put him upon inquiry as to the rate and time of payment of the interest.

1177. **Default in the payment of the yearly or half-yearly interest at the times stipulated** in the mortgage is held by high authority to give the right to foreclose immediately, although the period for payment of the principal sum has not arrived, and there is no provision specifically making a forfeiture of the principal upon a default in the payment of the interest.[2] A dictum of Lord Chancellor Sugden is much relied upon as establishing this doctrine: that, "default having been made in the payment of the interest thereon, the mortgagee would at any time after that event have had a right to file his bill for a foreclosure; because his right became absolute at law by the non-payment of the interest, the estate having been conveyed subject to a condition which had not been fulfilled."[3] This was followed in the case of *Edwards* v. *Martin*,[4] notwithstanding that the mortgagee had taken possession of the property, consisting of certain leasehold estates, and had realized by a sale of a portion more than enough to cover the interest due. Kindersley, Vice-Chancellor, said: "It is certainly singular that this question has never before been decided; but, in the absence of any direct authority, the dictum of Lord St. Leonards is sufficient for me to act upon when I consider that, upon the whole, that dictum is in accordance with the justice of the case."

Under an agreement for a mortgage, the court, in settling the terms of the mortgage to be given in pursuance of it, will ordinarily insert a proviso that the postponement shall be conditional on punctual payment of interest, although the agreement be silent upon the subject; so that if the mortgagor should make default

Chester, 11 Pa. St. 282. See Burt *v.* Saxton, 1 Hun (N. Y.), 551.

[1] Richards *v.* Holmes, 18 How. (U. S.) 143.

[2] Gladwyn *v.* Hitchman, 2 Vern. 135. In this case a mortgage was made for £450, payable at the end of five years, with interest at the rate of £5 per cent. in the mean time. The interest not being paid as stipulated, the mortgage was treated as forfeited.

[3] Burrowes *v.* Molloy, 2 Jones & Lat. 521.

[4] 25 Law J. N. S. Ch. 284.

in the payment of interest, the mortgagee's remedy by sale or foreclosure will immediately arise.[1]

1178. But the agreement in respect to the payment of the principal may be such that a default in the payment of the interest will give no right to institute proceedings for foreclosure; as, for instance, where it is provided that the principal shall not be called in during the lifetime of the mortgagor; though a yearly interest is reserved, a default in the payment of the interest during the lifetime of the mortgagor gives no right of action.[2]

If the mortgage contain an absolute covenant that the principal shall not be called in during a specified period, or until the happening of a certain event, then no default in the payment of the interest in the mean time will enable the mortgagee to sue.[3] Such a covenant may prevent a mortgagee's suing upon a salvage claim, as, for instance, upon a prior mortgage which he has been obliged to take up for his own protection; although that has matured, the

[1] Seaton *v.* Twyford, L. R. 11 Eq. 591.

[2] Burrowes *v.* Molloy, 2 Jones & Lat. 521. Lord Chancellor Sugden said: "Supposing that the principal sum had been made payable on a given day, no matter whether it was one year or twenty years after the date of the mortgage, with interest thereon half-yearly in the mean time, and that, before the day of payment of the principal money, default had been made in the payment of the interest thereon, the mortgagee would, at any time after that event, have had a right to file his bill for a foreclosure; because his right became absolute at law by the non-payment of the interest, the estate having been conveyed subject to a condition which had not been fulfilled. . . . . This transaction assumed a different shape with respect to the payment of the principal and the payment of the interest; it was only upon the non-payment of the principal sum, after the decease of the mortgagor, that the mortgagee was to have a right to foreclose. Interest was to be paid half-yearly upon the principal sum; and after the decease of the mortgagor any default in the payment of the interest would enable the mortgagee to file his bill of foreclosure, because the condition would then have been broken; but the covenant is independent of everything contained in the deed of mortgage, and is in point of fact an absolute covenant, that, notwithstanding anything contained in the mortgage deed, the mortgagee will not call in the principal money during the lifetime of the mortgagor. I do not see how any default in the payment of the interest, during the lifetime of the mortgagor, can enable the mortgagee to commit a breach of his covenant. It was said that this was like a case where, although the money was by the proviso for redemption to be paid at a fixed period, yet the mortgagee covenants that he will not call in the principal for a longer period, unless default should be made in the payment of the interest in the mean time; but the parties here have not entered into such an arrangement. I think, therefore, that under these instruments the plaintiff was not at liberty to file his bill for a foreclosure, as far as relates to the principal money; and therefore cannot do so in respect of the interest which accrued before the principal sum became payable."

[3] Fisher on Mortg. 3d ed. 347.

covenant in his own mortgage will prevent his enforcing it during the time included in his covenant.[1]

When it appears upon the whole mortgage deed that although the principal and interest are expressed to be payable at the end of several years, yet it was the intention and agreement of the parties that the interest should be paid half-yearly, the mortgagee may foreclose upon a default in the payment of the interest in the mean time.[2]

1179. It is competent for the parties to so provide that the continuance of the loan shall depend upon the promptness of the borrower's paying the interest, or the instalments of principal.[3] It is competent, also, for the parties to provide that upon a default of the mortgagor in the payment of the taxes assessed upon the premises the whole mortgage debt shall become due.[4] When the mortgage provides that upon any default in the payment of interest the principal sum shall immediately, or after the continuance of the default for a specified time, become due, time is made the essence of the contract, and a court of equity will not relieve the mortgagor from a default, unless he can show some good excuse for it, such as mistake or accident or fraud.[5] The time of payment may be extended by a parol agreement so that there will be no default within the meaning of the deed, because this is made with the concurrence of the creditor. Although such an agreement be not binding for want of consideration, and therefore is subject to revocation at any moment, it is a sufficient excuse for the default. The creditor cannot treat it as a default working forfeiture, without first demanding payment of the instalment.

Where it was provided that in case the interest should remain due and unpaid for ten days, the principal should become due,

[1] Burrows *v.* Malloy, 2 Jones & Lat. 521. See Dugdale *v.* Robertson, 3 Jur. N. S. 687, as to suit for injuries to the security in such case.

[2] Roddy *v.* Williams, 3 Jones & Lat. 1.

[3] Cassidy *v.* Caton, 47 Iowa, 22; 7 Reporter, 335; Stanclift *v.* Norton, 11 Kans. 218; Whitcher *v.* Webb, 44 Cal. 127.

[4] Stanclift *v.* Norton, *supra.*

[5] Terry *v.* Eureka College, 70 Ill. 236; Heath *v.* Hall, 60 Ill. 344; Baldwin *v.* Van Vorst, 2 Stock. (N. J.) 577; De Groot *v.* McCotter, 19 N. J. Eq. 531; Albert *v.* Grosvenor Investment Co. 8 Best & S. 664; L. R. 3 Q. B. 123. Per Lush, J.: "The word 'default' imports something wrongful, — the omission to do something which, as between the parties, ought to have been done by one of them. Therefore the omission of the plaintiff to pay on the day specified, being with the concurrence of the defendants, was not a default."

and the owner of the equity paid the interest after that time and took a receipt as of the day when it fell due, it was held to be a waiver of the forfeiture, so that the mortgagee could not proceed to foreclose.[1] Neither will the court enforce a forfeiture of the time of credit if the failure to pay the interest within the time specified was occasioned by the acts or declarations of the holder of the mortgage;[2] as where by agreement of the parties the payments of interest had been regularly made at the place of business of the mortgagor, and the payment on which the forfeiture of credit was claimed occurred because the mortgagee had not called for the interest, and the mortgagor did not know where to find him;[3] or where the owner of the equity tendered the amount due which the mortgagee refused to receive.[4]

It is not essential that this provision shall be contained in both the mortgage and note. When these instruments are executed at the same time with regard to the same transaction, and make reference to each other, they are but one in the eye of the law, and the terms of either are qualified by any provisions of the other applicable thereto. If the note states that it is secured by mortgage, a provision of the latter that upon default in the payment of interest the whole debt secured shall become due and payable becomes in law a part of the former.[5]

So completely is the time of payment changed by a provision for the forfeiture of credit upon the breach of a condition of the mortgage, that, in order to charge an indorser of the mortgage note, demand upon the maker and notice to the indorser should be given at the time the mortgagee elects to take advantage of the default and declares the debt to be due. A protest afterwards upon the maturity of the note according to its terms, without reference to the forfeiture, is of no effect.[6]

The general rule, however, is, that in the absence of any agreement that the whole debt shall become due upon a failure to pay

[1] Sire *v.* Wightman, 25 N. J. Eq. 102.

[2] Wilson *v.* Bird, 28 N. J. Eq. 352.

[3] De Groot *v.* McCotter, 19 N. J. Eq. 531. The order in this case was that upon payment to the complainant, within ten days, of the amount then due, all proceedings upon the mortgage be stayed, until default be made according to the condition of the mortgage, without reference to default in the payment of interest moneys previously due.

[4] Ewart *v.* Irwan, 1 Phila. 78 (7 Leg. Int. 134). Although this was a writ of *scire facias* the court applied equitable principles of construction.

[5] Noell *v.* Graves (Mo.), 8 Cent. L. J. 353; Waples *v.* Jones, 62 Mo. 440; Schoonmaker *v.* Taylor, 14 Wis. 313.

[6] Noell *v.* Graves, *supra*.

any instalment of it, the mortgage cannot be foreclosed in equity until the last instalment has become due.[1]

1180. There is almost always some provision in the mortgage under which the right to foreclose accrues upon a breach of any of the stipulations of the mortgagor to pay, and under which also the mortgagee may receive payment of the whole debt, and not merely of what is due at the time of sale, if it is not then all due.[2] This agreement need not be formal, but may be gathered from the expressed intention of the whole deed. If it appears from the whole instrument that such was the intention, the sale may be made upon any default, and the whole debt paid, though not all due; as where it was provided that on default it should be lawful for the mortgagee to sell and execute a deed, "rendering the surplus, if any," to the mortgagor.[3]

But a provision in a power of sale mortgage that, in case of a default for thirty days in the payment of any instalments of interest or of the principal, the mortgagee may advertise and sell, and apply the proceeds to the payment of the whole debt and interest due, only authorizes this application in case of sale under the power, and does not make the whole debt due merely by neglect to pay within the time prescribed. It does not change the time when the instalments of the mortgage become payable, so as to authorize a suit in equity to foreclose the mortgage and to apply the proceeds of sale immediately to the satisfaction of the mortgage. If the mortgagee chooses to proceed in equity, and the instalment due is paid before sale, he can only apply to the court when future instalments become due for a sale under the decree to satisfy them.[4]

1181. Such a provision in the mortgage is not considered a penalty, but an agreement as to the time when the debt shall become due.[5] Unless so provided, the foreclosure can extend no

[1] Harshaw *v.* McKesson, 66 N. C. 26; Hough *v.* Doyle, 8 Blackf. (Ind.) 300. This was by statute.

[2] Bushfield *v.* Meyer, 10 Ohio St. 334; Hosie *v.* Gray, 71 Pa. St. 198, where provision was made for issuing *scire facias;* McLean *v.* Presley, 56 Ala. 211.

[3] Pope *v.* Durant, 26 Iowa, 233.

[4] Holden *v.* Gilbert, 7 Paige (N. Y.), 208.

[5] Richards *v.* Holmes, 18 How. (U. S.) 143; Cecil *v.* Dynes, 2 Ind. 266; Greenman *v.* Pattison, 8 Blackf. 465; Hunt *v.* Harding, 11 Ind. 245; Hough *v.* Doyle, 8 Blackf. 300; Smart *v.* McKay, 16 Ind. 45; Taber *v.* Cincinnati, &c. R. R. Co. 15 Ind. 459; Magruder *v.* Eggleston, 41 Miss. 284; Grattan *v.* Wiggins, 23 Cal. 16; Jones *v.* Lawrence, 18 Ga. 277; Andrews *v.* Jones, 3 Blackf. 440; Schooley *v.* Romain, 31 Md. 574; Mobray *v.* Leckie, 42 Md. 474; Salmon *v.* Clagett, 3 Bland

further than to enforce satisfaction of such part of the debt as is due at that time, and for that purpose to sell so much of the mortgaged property as may be necessary. Courts of equity, without the aid of any statutory provision to that effect, may generally retain jurisdiction of the case until the subsequent instalments become due, and then decree a further sale; and under the general doctrines and practice of equity may direct a sale of the whole mortgaged estate, though not required for the payment of the instalment already due, in case the property is indivisible;[1] or with the consent of the mortgagor; or in case the court should be satisfied that the property would sell for a better price if sold together in one lot than if sold in parcels at different times.[2] But if the whole premises are sold the remedy is exhausted, and there can be no second sale upon the maturing of the principal debt.[3]

If other instalments become due after the suit is commenced, and before final hearing, these may be included in the decree without filing a supplemental bill if they are set out in the original bill, and are included in the prayer for decree.[4]

1182. Default at election of mortgagee. — Where, in a mortgage by a railroad company to trustees, it was provided that if the principal or interest should not be paid at the times stated the principal sum secured should become immediately due "at the election of the trustees," the whole debt was not due until the trustees had exercised their election; and a sale of the property free from the mortgage before this could not be authorized by an act of the legislature.[5]

An assignee of part of the notes secured by a mortgage containing such provision cannot alone exercise such option. It is an indivisible condition, to enforce which all parties interested in the mortgage security must unite.[6]

Where the mortgagee has the option to consider the entire debt

(Md.), 125; Adams *v.* Essex, 1 Bibb (Ky.), 149; Baker *v.* Lehman, Wright (Ohio), 522; Morgenstern *v.* Klees, 30 Ill. 422; Stillwell *v.* Adams, 29 Ark. 346; Goodman *v.* Cinn. & Chicago R. R. Co. 2 Disney (Ohio), 176.

[1] Bank of Ogdensburg *v.* Arnold, 5 Paige (N. Y.), 38.

[2] Caufman *v.* Sayre, 2 B. Mon. (Ky.) 202; Adams *v.* Essex, 1 Bibb (Ky.), 149; Peyton *v.* Ayres, 2 Md. Ch. 64; Wylie *v.* McMakin, 2 Md. Ch. 413.

[3] Poweshiek Co. *v.* Dennison, 36 Iowa, 244; Buford *v.* Smith, 7 Mo. 489.

[4] Magruder *v.* Eggleston, 41 Miss. 284.

[5] Randolph *v.* Middleton, 26 N. J. Eq. 543.

[6] Marine Bank *v.* International Bank, 9 Wis. 57.

matured on any default, it is not necessary that any particular form of expression should be used for the purpose of declaring such option. A recital in a mortgagee's deed under a power of sale in the mortgage, that "having elected to declare said mortgage due and payable, as by said mortgage he was authorized to do, according to the terms and conditions thereof, he had proceeded to exercise the power," is sufficient.[1]

Generally no notice of the mortgagee's election to consider the whole debt due is necessary. His proceeding to enforce the mortgage sufficiently shows his election. An assignee of the mortgagee may also exercise this option in the same way as the mortgagee himself may.[2]

In Wisconsin, however, it is held that notice of the mortgagee's election to consider the whole sum due must be given before the bringing of a suit for the whole sum.[3] The notice given by an attorney of the mortgagee is sufficient, though it does not show the authority on its face. If the mortgagor at the time of receiving notice refuse to pay the mortgage, he cannot object that the mortgagee resides out of the state, and no person is designated to whom payment could be made.[4] Such a provision being unusual, an attorney or officer of a corporation having general authority to execute a mortgage, the terms and conditions of which are not specified, would have no right to insert it; but a mortgage so made would not thereby be void except as to such provision.[5]

1183. No one but the person for whose benefit a provision for forfeiture of credit is made can take advantage of it. Thus, a covenant in the mortgage of a railroad company to trustees to secure bondholders, "that the principal sum secured by said mortgage shall become due, in case the interest on the bonds remains unpaid for four months," but not inserted in the bond, can only be taken advantage of by the trustees for the foreclosure of the mortgage according to the terms of the authority conferred upon them, and not by an individual bondholder; although upon the bonds there was a certificate signed by the trustees, that such a provision was contained in the mortgage. The mortgage could

[1] Harper *v.* Ely, 56 Ill. 179.

[2] Harper *v.* Ely, *supra*; Heath *v.* Hall, 60 Ill. 344; Princeton Loan & Trust Co. *v.* Munson, 60 Ill. 371; and see English *v.* Carney, 25 Mich. 178.

[3] Basse *v.* Gallegger, 7 Wis. 442; Marine Bank *v.* International Bank, 9 Wis. 57.

[4] Rosseel *v.* Jarvis, 15 Wis. 571.

[5] Jesup *v.* City Bank of Racine, 14 Wis. 331.

be foreclosed only upon the written request of the holder of a majority in amount of the bonds; and it was construed to mean that the trustees alone could enforce it, and not that an individual solely or jointly with others should have any right to do so.[1]

This clause is usually inserted for the benefit of the mortgagee; yet it has been held that it may be taken advantage of by the mortgagor as well; as in a case where after a failure to pay a part of the debt when due, and by the terms of the mortgage the whole debt thereupon became due, a person purchasing the notes and mortgage subsequently took them after maturity, and therefore subject to the equities existing between the original parties.[2]

1184. Provisions against forfeiture. — Where it is stipulated as part of the mortgage contract, that "the loan shall not be called in so long as the mortgagor continues to punctually pay the interest semi-annually, and the value of the estate pledged shall be double the amount of the debt, until the expiration of two years after the service of a written notice, stating the time when payment will be required," no foreclosure can be had until this provision is complied with, and the notice given.[3] In like manner, if the mortgage contains the usual provision that the several notes secured by it, though maturing at different dates, shall not become due and the mortgage shall not be foreclosed till the maturity of the note made payable latest, no judgment can be recovered upon any of the notes until the last has matured. The notes and deed are to be read together as one instrument.[4]

1185. The court has no power to relieve a mortgagor from a forfeiture of condition that the whole principal shall become due at the election of the mortgagee upon a failure to pay the interest, or to order a stay of proceedings until a further default,[5] unless fraud or improper conduct on the plaintiff's part is proved; as in case he has prevented the mortgagor from ascertaining the owner of the mortgage, and making payment to him within the time fixed by the condition.[6] The mortgagor having negligently permitted the time to pass, and the whole debt thereby to become

[1] Mallory *v.* West Shore Hudson Riv. R. R. Co. 35 N. Y. Superior, 174.

[2] First Nat. Bank of Sturgis *v.* Peck, 8 Kans. 660.

[3] See § 1178. Belmont Co. Branch Bk. *v.* Price, 8 Ohio St. 299.

[4] Brownlee *v.* Arnold, 60 Mo. 79; and see Noell *v.* Graves, 8 Cent. L. J. 353.

[5] Bennett *v.* Stevenson, 53 N. Y. 508.

[6] Noyes *v.* Clark, 7 Paige (N. Y.), 179.

due, cannot relieve the forfeiture by paying into court the interest or instalment on which the forfeiture occurred.[1] If the only questions be whether a tender had been properly made at any time, and if so, whether made within the time prescribed by the condition, these must be determined upon the trial of the foreclosure action.[2] But the forfeiture will not be enforced against one who in good faith and upon reasonable grounds denies his liability to pay interest, or claims that he has paid it, even if it turns out, upon trial of the matter, that he was in error about it.[3]

1186. Waiver of default of credit. — When a mortgagee has made his election to regard the principal sum due under a stipulation that he shall have this election upon the non-payment of interest for thirty days after it becomes due, he cannot be compelled to waive this provision and accept the interest. Undoubtedly an unconditional acceptance of the interest in default would be a waiver of the default;[4] but the acceptance of an instalment of the principal already due would not be such a waiver; nor would the commencement of a foreclosure suit prior to the expiration of the time after which the mortgagee may elect that the whole amount shall become due; he may after that time file an amended and supplemental complaint, and proceed for the collection of the whole amount.[5] An acceptance of an instalment by an agent of the mortgagee without his authority does not have the effect to restore the contract.[6]

A payment of a sum of money by the mortgagor for an extension of the time of payment for a term of years does not prevent the mortgagee from taking advantage of a subsequent forfeiture within that term; although such payment must be credited upon the mortgage debt, it is not appropriated to the interest so as to prevent a forfeiture.[7]

A provision in a mortgage by a railroad company, that the trustees shall sell the mortgaged property upon the request of the holders of a certain amount of the bonds secured, does not prevent a suit upon a bond which has become due by default according to the terms of the mortgage and bond. The enforce-

[1] Ferris *v.* Ferris, 28 Barb. (N. Y.) 29.
[2] Bennett *v.* Stevenson, 53 N. Y. 508.
[3] Wilcox *v.* Allen, 36 Mich. 160.
[4] Langridge *v.* Payne, 2 J. & H. 423; *In re* Taaffe, 14 Ir. Ch. R. 347.
[5] Malcolm *v.* Allen, 49 N. Y. 448.
[6] Sloat *v.* Bean, 47 Iowa, 60; 7 Reporter, 237.
[7] Church *v.* Maloy, 9 Hun (N. Y.), 148.

ment of the bond and of the mortgage may depend upon different circumstances.[1]

It is no excuse for the non-payment of the money that the mortgagee died eight days before the interest became due, and the debtor urged feelings of delicacy about intruding with affairs of business so soon afterwards, it appearing that he made no attempt to pay the money, and paid no attention to the matter until it was demanded of him some weeks afterwards. He should have made inquiry within a reasonable time whether there was any one authorized to receive the money.[2]

A forfeiture of credit is waived by accepting interest after the expiration of the time at which the holder of the mortgage, by its terms, is entitled to a forfeiture of the principal sum. His receipt acknowledging the payment of interest as of the day on which it fell due is inconsistent with any claim of forfeiture.[3] But under a provision in a mortgage that in case the interest be duly and punctually paid the principal may remain for two years, or any other definite period, if an instalment of interest becomes due and is not paid upon demand, and the mortgagee thereupon demands payment of principal and interest, the mortgagee does not by a subsequent acceptance of the interest waive his right to call in the principal.[4]

1187. When a guarantor, or surety, or indorser, is secured by a mortgage, he cannot foreclose until he has paid the obligation he became liable upon;[5] and a mortgage given to indemnify one against damages occasioned by the negligence of the mortgagor or other person cannot be foreclosed until judgment has been recovered for the negligence, because it is not certain before this that the mortgagee has been damnified.[6] Where a mortgage was given to secure the performance of a contract of the mortgagor to consign all the goods he should manufacture for

[1] Phila. & Balt. Cent. R. R. Co. *v.* Johnson, 54 Pa. St. 127.

[2] Mobray *v.* Leckie, 42 Md. 474.

[3] Sire *v.* Wightman, 25 N. J. Eq. 102.

[4] Kerne *v.* Biscoe, L. R. 8 Ch. D. 201; Langridge *v.* Payne, 2 J. & H. 423, distinguished, as the mortgagee's notice there might be regarded as conditional. See observation in Taafe *in re* 14 Ir. Ch. 347, that the latter case should be overruled.

[5] Ketchum *v.* Jauncey, 23 Conn. 126; Kramer *v.* Farmers' & Mechanics' Bk. of Steubenville, 15 Ohio, 253; McConnell *v.* Scott, Ib. 401; Ohio Life Ins. & Trust Co. *v.* Reeder, 18 Ohio, 35; Lewis *v.* Richey, 5 Ind. 152; Francis *v.* Porter, 7 Ind. 213.

[6] Grant *v.* Ludlow, 8 Ohio St. 1; Tilford *v.* James, 7 B. Mon. (Ky.) 337; Planters' Bank *v.* Douglass, 2 Head (Tenn.), 699.

three years to the mortgagee, who accepted drafts for the mortgagor's accommodation, and was obliged to pay them, it was held that upon the insolvency of the mortgagor that the mortgagee was entitled to an immediate foreclosure, because the agreement contemplated a continuous performance of it, and the assignee could not carry on the business as stipulated.[1]

An indorser for accommodation who is secured for his liability by a mortgage need not wait till the note indorsed by him is protested before paying it, in order to have the benefit of his mortgage security; but upon being informed by the principal debtor that he could not and should not pay the note, such indorser may pay the note in time to save it from going to protest, and such payment will be within the condition of the mortgage.[2]

The condition of a mortgage given to indemnify a surety is not broken until the surety has been obliged to pay the debt, and therefore his right to foreclose does not accrue until that time.[3] It is sufficient, however, if he has paid a part of the debt.[4] Neither is it necessary that the amount of the damages sustained by the mortgagee should be determined by a suit at law before filing a bill to foreclose.[5]

1188. When the condition is to pay or to save harmless, the mortgagee may foreclose on the mortgagor's failure to pay;[6] although when the condition is merely to save harmless he cannot foreclose until he has suffered loss. If the condition be to pay and save harmless, it is broken upon failure to pay.

A condition that the mortgagor "shall promptly pay and discharge all notes and papers of his upon which the mortgagees shall become indorsers or acceptors, together with all the interest, costs, and charges thereon, so as to save said mortgagees harmless by reason of their connection with such paper," is broken at once

[1] Harding *v.* Mill River Woollen Manuf. Co. 34 Conn. 461.

[2] National State Bank of Newark *v.* Davis, 24 Ohio St. 190.

[3] Colvin *v.* Buckle, 8 M. & W. 680; Rodman *v.* Hedden, 10 Wend. (N. Y.) 500; Platt *v.* Smith, 14 Johns. (N. Y.) 368; Powell *v.* Smith, 8 Ib. 249; M'Lean *v.* Ragsdale, 31 Miss. 701; Shepard *v.* Shepard, 6 Conn. 37; Pond *v.* Clarke, 14 Conn. 334.

[4] Beckwith *v.* Windsor Manuf. Co. 14 Conn. 594.

[5] Rodgers *v.* Jones, 1 McCord (S. C.), Ch. 221.

[6] Thurston *v.* Prentiss, 1 Mich. 193; Dye *v.* Mann, 10 Mich. 291; Butler *v.* Ladue, 12 Mich. 173; Francis *v.* Porter, 7 Ind. 213; Ellis *v.* Martin, 7 Ind. 652; Lewis *v.* Richey, 5 Ind. 152.

on a failure to pay at maturity, and the mortgagee may foreclose without further action. Although the power of sale in this mortgage was limited to the case of the mortgagee being damnified by paying the debts himself, the mortgage was foreclosed in equity. The power of sale need not be coextensive with the condition of the mortgage, and although that remedy cannot be used for a breach not covered by the power, the remedy in equity is open upon every breach of the condition.[1]

When a mortgage is given to secure the payment of the note of a third person, which the mortgagor transfers to the mortgagee at the time of executing the mortgage, the mortgagee may foreclose the mortgage upon the happening of a breach, without first prosecuting his remedy against the maker of the note.[2]

1189. A mortgagee may be estopped from foreclosing his mortgage by an agreement with the mortgagor, upon which the latter has acted, that the mortgage should never be enforced against him; and even without any positive agreement if the mortgagee, by giving the mortgagor to understand that he should be released of the burden of the mortgage, intentionally leads the mortgagor to act in such a manner that he will be seriously prejudiced by the mortgagee's not carrying out the understanding.[3]

A person being desirous of purchasing land upon which there was a mortgage, but being unable to make the payments at the times specified in the mortgage, called upon the holder of it, who agreed verbally that if the proposed purchaser would pay two hundred dollars the ensuing spring, and interest on all sums remaining unpaid annually thereafter, and would make certain improvements, he would extend the time of payment of the mortgage for twenty years. The purchase was accordingly made and all the requirements complied with, except that the purchaser failed for two years to pay the interest. It was decided that the time of payment was extended by the verbal contract, and that there was no default in the payment of the principal, although

[1] Butler *v.* Ladue, 12 Mich. 173.

[2] Ballenger *v.* Oswalt, 26 Ind. 182; O'Haver *v.* Shidler, Ib. 278.

[3] Faxton *v.* Faxton, 28 Mich. 159. In this case the mortgagee having persuaded a son of the mortgagor, after the death of the latter, to remain upon the farm, and support his father's family, upon a promise that the mortgage should not be enforced against the family, was not allowed, after the son had cultivated the farm and supported the family for several years, to foreclose the mortgage. See Fausel *v.* Schabel, 22 N. J. Eq. 126, for circumstances and agreement not amounting to an agreement to extend.

there might have been a foreclosure for the interest remaining unpaid.[1]

1190. If the time of payment of a mortgage be extended, the right to foreclose is of course suspended until the expiration of the extended term. A verbal agreement to extend the time of payment is binding, and suspends the right to foreclose if founded on a good consideration and otherwise valid;[2] but if made without consideration it amounts to nothing, and the mortgage may be foreclosed at any time.[3] The payment of interest in advance is a sufficient consideration to support an extension of a mortgage.[4]

Where the mortgage was payable in six months after date, with interest monthly in advance, and contained also a stipulation that in case the interest or any portion of it should become due and remain unpaid after demand, then the mortgage should be foreclosed, the prompt payment of the interest was held not to prolong the time of payment beyond the six months, and a cause of action upon the note and mortgage then accrued.[5]

An agreement to extend the payment of a debt already due is not to be implied from a provision in a mortgage of a mining claim, that the debt is to be paid as fast as it can be made out of the claim, after deducting certain expenses; nor does such an agreement imply that the claim is to be paid only in this way.[6]

When a mortgagee in assigning an overdue mortgage guarantees its payment and provides for its extension upon condition of the prompt payment of the interest, this agreement does not enure to the benefit of the mortgagor; but the mortgagee may at any time after a default require the assignee to proceed to foreclose at his expense.[7]

1191. If the time of payment of such a mortgage be extended by a parol agreement, though this may be insufficient to change the legal effect and operation of the writing under seal, it will be a sufficient waiver of the default contemplated in the mortgage, and neither a court of equity nor a court of law will

[1] Burt *v.* Saxton, 1 Hun (N. Y.), 551.

[2] Tompkins *v.* Tompkins, 21 N. J. Eq. 338; Trayser *v.* Trustees of Indiana Asbury University, 39 Ind. 556; Loomis *v.* Donovan, 17 Ind. 198; Redman *v.* Deputy, 26 Ind. 338.

[3] Massaker *v.* Mackerley, 1 Stockt. (N. J.) 440.

[4] Maher *v.* Lanfrom, 86 Ill. 513; *In re* Betts (U. S. C. C. E. D. Mo. 1879), 7 Reporter, 225.

[5] Pendleton *v.* Rowe, 34 Cal. 149.

[6] Sharpe *v.* Arnott, 51 Cal. 188.

[7] Lee *v.* West Jersey Land & Cranberry Co. 29 N. J. Eq. 377.

enforce a forfeiture of credit which has occurred under such agreement.[1]

[1] Albert *v.* Grosvenor Investment Company, L. R. 3 Q. B. 127. Mr. Chief Justice Cockburn said: "This is the case of a mortgage whereby the mortgagor transfers the property in certain goods to the mortgagees, but subject to the mortgagor's right of redemption; and there are certain clauses in the deed, the result of which is, that the mortgagees cannot seize and sell the goods unless the mortgagor makes default in paying the instalments of £2, which he is bound to do on each successive Monday till the loan is repaid. Now the facts are, that the plaintiff's wife went to Bayne (who must be taken to have had full authority to bind the defendants by what he did, for, on the evidence, I see not the slightest reason to believe any one else ever interfered in the management of the business of the company) and told him that her husband had difficulty in meeting the instalment due on the 28th of August, and Bayne extended the time for the payment of that and the next instalment to the 11th of September. Now the bill of sale provides that if the mortgagor shall make 'default' in payment of the sum of £62 10s., or any part thereof, the whole amount shall be then immediately due and payable; and it shall be lawful for the mortgagees to take possession of the goods, and to sell and dispose of them. Now 'default' must be taken to mean a non-payment by the party bound to pay, without the consent of the parties having a right to waive the payment. And I see nothing which goes to show that if, by the consent of the person who is to receive payment, the time for payment is extended, the omission to pay within the time specified must be a 'default' within the meaning of the word in the bill of sale; and it would be monstrous to hold that it was a default, for the mortgagee might always lead the mortgagor into a snare by consenting that the time for payment should be extended, and then coming down upon him by insisting that there had been a default. And even if money were offered by the mortgagor the next day, and it were accepted by the mortgagee, the result would be the same. 'Default' must mean a default where something is not done by the mere act of omission of the one party, and not an omission with the concurrence of the other party. And in the present case, the voluntary extension of the time by Bayne alters the character of the act of the plaintiff, which would otherwise have been a default."

CHAPTER XXVI.

WHEN THE RIGHT TO FORECLOSE IS BARRED. 1192–1214.

1192. Statutes of limitation are as a general rule only applicable as such to proceedings at law; but without having any binding force upon courts of equity they have been adopted here by analogy as fixing the time within which rights may be enforced in equity.[1] Following this analogy the right of the mortgagee to foreclose and of the mortgagor to redeem is presumed to be barred after the lapse of such a period as is prescribed by the statute for enforcing a right of entry upon lands. This period, by the English Statute of Limitation of 32 Henry 8, and 21 James 1, and by the earlier statutes enacted in this country, which generally followed the English statute, was twenty years;[2] and following the analogy of these statutes so long as they remained in force, the lapse of this period was in the same way presumed, as between a mortgagor and mortgagee, to be a bar to the rights of the one as against the other. In the early case of *White* v. *Ewer*,[3] "the Lord Keeper declared that he would not relieve mortgages after twenty years; for that the statute of 21 Jac. 1, c. 16, did adjudge it reasonable to limit the time of one's entry to that number of years; unless there are such particular circumstances as may vary the ordinary case, as infants, *femes covert*, &c. are provided for in the very statute; though those matters in equity are to be gov-

[1] Ayres *v.* Waite, 10 Cush. (Mass.) 72; Morgan *v.* Morgan, 10 Ga. 297; *per contra* Lord Redesdale, 4 Bligh, 119, said the statute was meant to bind courts of equity. Pitzer *v.* Burns, 7 W. Va. 63, 69.

[2] The words of the statute 21 James 1, c. 16, § 1 are, that "for quieting men's estate, be it enacted, that no person or persons shall, at any time hereafter, make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same; and in default thereof, such persons so entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made, any former law or statute to the contrary notwithstanding." In case of disabilities entry may be made within ten years after the removal of the same.

[3] 2 Vent. 340.

erned by the course of the court, and that 't is best to square the rules of equity as near the rules of law and reason as may be."

It is the general rule, therefore, that no interest having been paid, and no entry made under the mortgage, or other proceedings had to enforce the mortgage, it is presumed as a matter of fact from these circumstances that the mortgage has been discharged by payment or otherwise. This presumption of fact is, however, always liable to be controlled by other evidence. The period of twenty years is not adopted as a fixed and positive limitation of right, but as an equitable rule after the analogy of the statute of limitations.[1] In those states in which the time of limitation has been made less than twenty years, still following the analogy of the statute of limitations, a corresponding period is adopted in equity as a bar to a suit to foreclose or redeem a mortgage.[2]

1193. The tendency of legislation has been to reduce the period of limitation within which suits relating to real property shall be brought.[3] A statement is appended of the periods of limitation in the several states applicable to actions for the recovery of real property.[4] A reference to the earlier statutes in several

[1] In **Iowa**, the statute of limitations is held to apply directly to suits in equity as well as suits at law, and to bar a suit to foreclose a mortgage after the lapse of ten years. Newman *v.* De Lorimer, 19 Iowa, 244; Hendershott *v.* Ping, 24 Iowa, 134. The right to foreclose a title bond is barred in the same time. Day *v.* Baldwin, 34 Iowa, 380.

[2] As in **Vermont**: Richmond *v.* Aiken, 25 Vt. 324; Martin *v.* Bowker, 19 Vt. 526; Merriam *v.* Barton, 14 Vt. 501. **Connecticut**: Haskell *v.* Bailey, 22 Conn. 569; Crittendon *v.* Brainard, 2 Root, 485. **Alabama**: Gunn *v.* Brantley, 21 Ala. 633. **Kentucky**: Field *v.* Wilson, 6 B. Mon. 479. **Iowa**: Crawford *v.* Taylor, 42 Iowa, 260.

[3] "It might at first sight be considered that the duration of wrong ought not to give it a sanction, and that the long suffering of injury should be no bar to the obtaining of right when demanded. But human affairs must be conducted on other principles. It is found to be of the greatest importance to promote peace by affixing a period to the right of disturbing possession. Experience teaches us, that owing to the perishable nature of all evidence, the truth cannot be ascertained on any contested question of fact after a considerable lapse of time. The temptation to introduce false evidence grows with the difficulty of detecting it; and at last, long possession affords the proof most likely to be relied upon of the right of property. Independently of the question of right, the disturbance of property after long enjoyment is mischievous. It is accordingly found both reasonable and useful that enjoyment for a certain period of time against all claimants should be considered conclusive evidence of title." First Report of the Real Property Commissioners of England, 1829, p. 39.

[4] **Alabama**: Ten years. R. C. 1876, § 3225. **Arkansas**: Five years. Dig. of Stat. 1874, § 4118. **California**: An action upon any contract, obligation, or liability, founded upon an instrument in writing executed in this state must be brought within four years. This is held to apply to mort.

states will show that the period has been materially shortened in the present statutes. But the history of the law of limitations in

gages, which are not regarded as conveyances of land. Code of Civil Procedure, § 337; Amendments, 1874, p. 291. **Colorado**: Six years. R. S. 1868, p. 438. **Connecticut**: Fifteen years. G. S. 1875, p. 493. **Dakota Territory**: Twenty years. R. C. 1877, p. 515. **Delaware**: Twenty years. R. C. 1874, p. 727. **Florida**: Seven years. Laws, 1872, p. 20. **Georgia**: Twenty years; or seven years under written evidence of title. Code, 1873, §§ 2682, 2683. And see Parker *v.* Jones, 57 Ga. 204. **Idaho Territory**: Five years. R. L. 1875, p. 588. **Illinois**: An action or sale to foreclose any mortgage or deed of trust in the nature of a mortgage is limited to ten years after the right of action or right to make such sale accrues. Real actions are limited to twenty years. R. S. 1877, c. 83, §§ 1, 11. **Indiana**: Twenty years. Gavin & Hord, vol. 2, p. 159; Rev. 1876, vol. 2, p. 124. **Iowa**: Ten years. Code, 1873. p. 432. **Kansas**: Fifteen years. G. S. 1868, c. 80, § 16; Dassler's Stat. of Kans. 1876, p. 644. **Kentucky**: Fifteen years. G. S. 1873, c. 71, § 1. **Maine**: Twenty years. R. S. 1871, c. 105, § 1. **Massachusetts**: Twenty years. G. S. 1860, c. 154, § 1. **Michigan**: Fifteen years. C. L. 1871, § 7137. **Minnesota**: An action to foreclose a mortgage upon real estate must be commenced within ten years after the cause of action accrues. Laws, 1870, c. 60. This act did not apply to power of sale mortgages. Golcher *v.* Brisbin, 20 Minn. 453. By Laws 1871, c. 52, mortgages containing powers of sale must be foreclosed within the same time. See, also, Archambau *v.* Green, 21 Minn. 520; Parsons *v.* Noggle, 23 Minn. 328. **Mississippi**: No action or other proceeding can be had upon a mortgage or deed to recover the money secured, except within the time that may be allowed for the commencement of an action at law upon such writing; and in all cases where the remedy at law to recover the debt is barred, the remedy in equity on the mortgage is barred. Actions on contracts not under seal are limited to six years; and actions on open account to three years. R. C. 1871, §§ 2150, 2151. An equitable mortgage by absolute conveyance is subject to same rule when mortgagor remains in possession. Green *v.* Mizelle, 54 Miss. 220. **Missouri**: Ten years. 2 Wagner's Stat. 1870, p. 915. **Montana Territory**: Three years. Laws, 1872, p. 516. **Nebraska**: Actions to foreclose mortgages must be commenced within ten years after the cause of action accrues. G. S. 1873, p. 525. **Nevada**: Four years, as in Cal. C. L. 1873, §§ 1020, 1031; Henry *v.* Confidence, &c. Co. 1 Nev. 619. **New Hampshire**: Actions for the recovery of real estate are limited to twenty years. Actions upon notes secured by mortgage may be brought so long as the plaintiff is entitled to bring an action upon the mortgage. G. S. 1867, c. 202, §§ 1 & 5; G. L. 1878, c. 221, §§ 1 & 5. **New Jersey**: Twenty years. Nixon's Dig. 1868, p. 512; Rev. 1877, p. 597. **New York**: Twenty years. 3 Fay's Dig. of Laws, 1876, p. 518. This applies to foreclosure suits; but suits for redemption must be brought within ten years. **North Carolina**: Action must be commenced within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on it. Battle's Rev. 1873, p. 149. **Oregon**: Actions for the recovery of real property and suits in equity to determine any right or claim to real property may be brought within twenty years. An action upon a sealed instrument within ten years. G. L. 1872, p. 106. A foreclosure suit is not regarded as a suit upon a real estate interest, and therefore is barred in ten years as a suit upon a sealed instrument. Eubanks *v.* Leveridge, 4 Sawyer, 274. **Pennsylvania**: Twenty-one years. Brightly's Purdon's Dig. vol. 2, p. 927. **Rhode Island**: Twenty years. G. S. 1872, c. 194, § 4. **South Carolina**: Twenty years. R. S. 1873, p. 588. **Tennessee**: Seven years. Code,

England illustrates this fact most forcibly. At common law there was no period of limitation within which any action now in use should be brought. An uncertain doctrine of presumption was applied against stale demands and claims.

Previous to the reign of Henry VII. there was no statute prescribing a period of a certain number of years within which the assertion of a claim to real estate was limited; though different events had been selected by successive enactments, from the Anglo-Norman times down to the time of Henry VII., as periods of limitation beyond which claimants should not go for the foundation of titles as against persons who had been in possession since the specified time. The lapse of time rendered fresh starting points necessary to the security of titles. The beginning of the reign of Henry I., of Richard I., the last return of King John out of Ireland into England, the coronation of King Henry III., and the first voyage of King Henry III. into Gascony, were periods of limitation successively selected.[1]

"A profitable and necessary statute," passed near the close of the reign of Henry VIII.,[2] for the first time provided a fixed period of limitation within which actions should be brought. The general period for actions for the recovery of real estate was threescore years. By the statute of James I. this period was reduced to twenty years. By the recent act, which went into operation on the first day of January 1879, the period is reduced to twelve years.[3]

1871, §§ 2763–2765. **Texas**: Ten years. Paschal's Dig. 1873, p. 765. **Vermont**: Fifteen years. G. S. 1862, p. 442, § 1. **Virginia**: Fifteen years. Code, 1873, p. 997. **West Virginia**: Ten years. Code, 1870, p. 546. **Wisconsin**: Twenty years. R. S. 1878, c. 177, § 4209. The twenty years' limitation applies to suits for the foreclosure of mortgages on the ground that they are instruments under seal. Whipple *v.* Barnes, 21 Wis. 327. A suit to redeem, however, must be brought within ten years, as this is an equitable action coming within a clause of the statute limiting actions not otherwise specified for. Knowlton *v.* Walker, 13 Wis. 264. R. S. 1878. § 4227. **Wyoming Territory**: Twenty-one years. C. L. 1876, p. 34.

[1] See Stat. of Merton (20 Henry 3), c. 8; Stat. of West. 1 (3 Edw. 1), c. 39; see Edson *v.* Munsell, 10 Allen (Mass.), 557, for a sketch of the history of the English Statute of Limitations and of that of Massachusetts. And see Fellows *v.* Clay, 4 Q. B. 354, per Lord Denman, C. J.

[2] Co. Litt. § 115 *a*; 32 Henry 8, c. 2.

[3] By the Real Property Limitation Act, 1874, which went into operation on the first day of January, 1879, "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, in law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall

1194. In some early cases it was declared that the presumption of payment arising from the lapse of time, though applicable to a bond secured by the mortgage, was not applicable to the mortgage itself, inasmuch as the legal estate was in the mortgagee, and the mortgagor was regarded as a mere tenant at will, whose possession was therefore the possession of the mortgagee.[1] This doctrine was, however, repudiated by Lord Thurlow in 1791,[2] and it has not in any case since been asserted. The fact

have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given." 37 & 38 Vict. c. 57, § 8.

[1] Toplis *v.* Baker, 2 Cox, 118; Leman *v.* Newnham, 1 Ves. Sen. 51; Dictum in Cholmondeley *v.* Clinton, 2 Meriv. 360.

[2] Trash *v.* White, 3 Bro. Ch. 289. The Lord Chancellor said: "That if the case was clear that no interest had been paid for twenty years, he had always understood that it did raise the presumption, that the principal had been paid; but there must not only be non-payment of interest, but no demand; and, in that case, he thought the presumption on a mortgage as strong as that at law." In Christophers *v.* Sparke, 2 Jac. & W. 223, though the decision turned upon another point, Sir Thomas Plumer, Master of the Rolls, said, in relation to this question of presumption: "I cannot accede to the doctrine, that no length of time will operate against a mortgagee who has been out of possession without claim or acknowledgment. The argument of there being a tenancy at will arises from a mere fiction; for there is no actual tenancy, no demise, either express or implied. A mortgagor has not even the rights of a tenant at will; he may be turned out of possession without notice, and is not entitled to the emblements. It is only *quodam modo* a tenancy at will, as Lord Mansfield says, in one of the cases. Moss *v.* Gallimore, 1 Doug. 279. We cannot push it to that extent, reasoning on the supposed relation of landlord and tenant, which is not founded in fact. The relation of mortgagor and mortgagee is peculiar: in a court of equity the former is considered as owner; and that is the nature of the contract between them; the tacit agreement is, that he is to be the owner if he pays. Then what is to be the effect of one person's continuing for twenty years in possession of the estate of another, who does nothing to make good his title, and to keep alive the relation of mortgagor and mortgagee? The difficulty I feel is, that if twenty years' possession, without claim on the part of the mortgagee, will not operate as a defence against him, I do not see how any period of time, however long, can bar him. If the fiction of a tenancy at will is an answer to the objection after twenty years, why will it not be an answer after any other time? There would be no possibility of stopping. With respect to the mortgagor, it is clear that his equity is shut out by the mortgagee being in possession for twenty years without acknowledgment; then why should this not be reciprocal? Why should it be necessary for the relation to be kept alive in the one case, and not in the other? For these reasons, though I do not give a positive opinion, I cannot agree to the doctrine intimated in the cases alluded to."

that the debt is secured by a mortgage does not place it on any different footing from a debt due upon a bond without a mortgage, but is liable to be defeated by the same presumption, arising from lapse of time and laches of the mortgagee.

Although the mortgagor is not a tenant at will to the mortgagee in any such sense that his possession cannot become adverse, yet the resemblance holds to this extent, that so long as the mortgagor acknowledges his relation to the mortgagee, by payment of interest or the like, his possession is the possession of the mortgagee.[1] The mortgagor may convey, mortgage, or lease the premises, or deal with them in other ways as the owner of them, without rendering his possession hostile to the mortgagee. The constructive possession of the mortgagee continues until the mortgagor's holding is either in opposition to the will of the mortgagee or is without any recognition of his right.[2]

1195. This doctrine of presumption has been one of frequent application against the mortgage debt, and is fully established everywhere.[3] It arises from the policy of the law. It does not proceed necessarily on a belief that payment has actually taken place.[4] The lapse of time and the neglect of the mortgagee to enforce his demand against the mortgagor, when he continues

[1] In Harris *v.* Mills, 28 Ill. 44, Mr. Justice Walker says: "It has been said that no length of time will bar a foreclosure by a mortgagee out of possession. This is placed upon the ground that the relation of landlord and tenant is supposed to exist between the parties. But such is not the true relation of the parties. For some purposes, and to a limited extent only, a portion of the incidents are the same. To a limited extent, and for some purposes, the relation of vendor and vendee, and trustee *and cestui que trust*, also exists."

[2] Doe *v.* Williams, 5 A. & E. 291; 6 Nev. & M. 816; Doe *v.* Surtees, 5 B. & Ald. 687; Higginson *v.* Mein, 4 Cranch, 415; Howland *v.* Shurtleff, 2 Met. (Mass.) 26; Inches *v.* Leonard, 12 Mass. 379; Sheafe *v.* Gerry, 18 N. H. 245; Howard *v.* Hildreth, 18 N. H. 105; Roberts *v.* Littlefield, 48 Me. 61; Chick *v.* Rollins, 44 Me. 104; Bates *v.* Conrow, 3 Stockt. (N. J.) 137; Atkinson *v.* Patterson, 46 Vt. 750; Martin *v.* Jackson, 27 Pa. St. 504; Benson *v.* Stewart, 30 Miss. 49; Boyd *v.* Beck, 29 Ala. 703; Drayton *v.* Marshall, Rice (S. C.) Eq. 373; Pitzer *v.* Burns, 7 W. Va. 63.

[3] Howland *v.* Shurtleff, 2 Met. (Mass.) 26; Inches *v.* Leonard, 12 Mass. 379; Bacon *v.* McIntire, 8 Met. (Mass.) 87; Hughes *v.* Edwards, 9 Wheat. 498; Collins *v.* Torry, 7 Johns. (N. Y.) 278; Jackson *v.* Wood, 12 Ib. 242; Jackson *v.* Pratt, 10 Ib. 381; Giles *v.* Baremore, 5 Johns. (N. Y.) Ch. 552; Newcomb *v.* St. Peter's Ch. 2 Sandf. (N. Y.) Ch. 636; Martin *v.* Bowker, 19 Vt. 526; Field *v.* Wilson, 6 B. Mon. (Ky.) 479; McNair *v.* Lot, 34 Mo. 285; Nevitt *v.* Bacon, 32 Miss. 212; Wilkinson *v.* Flowers, 37 Miss. 579; McDonald *v.* Sims, 3 Kelly (Ga.), 383; Hoffman *v.* Harrington, 33 Mich. 392; Reynolds *v.* Green, 10 Mich. 355.

[4] Hillary *v.* Waller, 12 Ves. 239, 252, per Sir William Grant.

in adverse possession without recognizing the debt in any way, are grounds for a presumption in fact, which unexplained authorizes a jury to infer that the mortgage is satisfied, and is a sufficient answer to a bill by the mortgagee to foreclose. A bill to foreclose does not lie after the mortgagor has held adverse possession for a period equal to the statute period of limitations for real actions.[1] But the fact that there has been no recognition of the mortgage debt for a period less than the statute period of limitation, as, for instance, nineteen years, affords no presumption of payment.[2]

If the mortgagor remains in possession for twenty years without paying interest or rent, or otherwise admitting that the mortgage debt is unpaid, this is good presumptive proof of payment, and a defence to an action for foreclosure.[3] This rule applies equally to estates held in trust; the equitable rule, that the statute of limitations does not bar a trust estate, holds only as between *cestui que trust* and trustee, and not between a *cestui que trust* and trustee on the one side and a stranger on the other.[4] Neither does it matter that the *cestui que trust* is under disability, if there be a trustee to represent him.[5]

The mortgagor may avail himself of the benefit of this presumption of payment not only in defence to a foreclosure suit but in a bill for reconveyance of the property, which he is constrained to bring for his protection against a judgment creditor of the mortgagee, who with full knowledge of the fact, that the deed to the latter is merely a mortgage, is about to proceed to sell the mortgaged premises as the property of the mortgagee.[6]

1196. The presumption of payment is not conclusive in favor of a mortgagor who has been in uninterrupted possession for twenty years, but may be controlled by evidence of part payment of principal or interest, or other admissions or circumstances from which it may be found that the debt is still unpaid; but parol evidence to control this presumption should clearly show some

[1] Cleveland Ins. Co. *v.* Reed, 24 How. 284; Downs *v.* Sooy, 28 N. J. Eq. 55.

[2] Boon *v.* Pierpont, 28 N. J. Eq. 7.

[3] Bacon *v.* McIntire, 8 Met. (Mass.) 87; Chick *v.* Rollins, 44 Me. 104; Crook *v.* Glenn, 34 Md. 55; Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 135; Jackson *v.* Wood, 12 Johns. (N. Y.) 242; Jackson *v.* Pratt, 10 Ib. 381; Collins *v.* Torry, 7 Ib. 278; Jackson *v.* Hudson, 3 Ib. 375.

[4] Lord Hardwick, in Llewellin *v.* Mackworth, 15 Vin. Abr. 125, pl. 1; Bond *v.* Hopkins, 1 Sch. & Lefr. 429.

[5] Crook *v.* Glenn, 30 Md. 55; Wych *v.* East India Co. 3 P. Wms. 309.

[6] Downs *v.* Sooy, 28 N. J. Eq. 55.

positive act of unequivocal recognition of the debt within that time.[1] Mere silent acquiescence in the mortgagee's demands of payment, without a well defined verbal promise to pay on the part of the mortgagor, or admission on his part of the debt, is not sufficient to repel the presumption.[2]

A new promise will take the mortgage out of the statute of limitations; as, for instance, where a note and mortgage were presented for payment or renewal to the makers, who wrote and signed at the foot of the mortgage a promise under seal to renew the note, and to give a new mortgage, whenever the exact amount of the debt should be ascertained; a plea of the statute of limitations to a bill to foreclose the mortgage was disallowed.[3]

But an extension of a mortgage which covers a homestead not executed by the wife of the mortgagor does not have the effect to keep the mortgage on foot as against the homestead right.[4]

1197. Presumption of payment is repelled by circumstances which evince an improbability of any discharge,[5] as well as by an express acknowledgment of the debt, or by acts recognizing it. Thus, this presumption has been considered as answered by showing that the mortgage debt belonged to the mother of the owner of the estate mortgaged, and that she had not permitted the title deeds to be delivered to him.[6]

It has even been held in a case where it was shown that the parties to a bond resided in a country which was occupied by contending armies and was in such a disturbed condition as to render it highly improbable that debts could or would be collected, the time during which the war continued should not be computed as forming any part of the time whose lapse gives rise to a presumption of payment.[7] But ordinarily the absence of the mortgagor from the state when the cause of action accrues or afterwards does not suspend or prevent the statute of limitations from running against a suit to foreclose the same, for the reason that the remedy may be as well pursued during his absence as in his presence.[8]

1198. A payment of interest or of part of the principal re-

[1] Jarvis *v.* Albro, 67 Me. 310.

[2] Cheever *v.* Perley, 11 Allen (Mass.), 584.

[3] Hart *v.* Boyt, 54 Miss. 547.

[4] Wells *v.* Harper, 51 Cal. —; 7 Reporter, 266.

[5] Brobst *v.* Brock, 10 Wallace 519; Snavely *v.* Pickle, 29 Gratt. (Va.) 27.

[6] Leman *v.* Newnham, 1 Ves. 51.

[7] Hale *v.* Pack, 10 W. Va. 145.

[8] Eubanks *v.* Leveridge, 4 Sawyer, 274; Anderson *v.* Baxter, 4 Oregon, 107.

news the mortgage, so that an action may be brought to enforce it within twenty years after such last payment. This is a rule universally recognized. Where there are several persons interested in the equity of redemption, such payment by one of them keeps alive the right of entry not only against him, but also against all other owners of the equity.[1] Payment by an agent of the mortgagor, as, for instance, by his solicitor, has, of course, the same effect as a payment by the mortgagor himself;[2] but payment by a stranger does not affect the mortgagor's rights.[3] Acknowledgment of the debt made to a stranger does not avoid the running of the statute of limitations.[4] Payments of interest by a tenant for life are binding upon those entitled to the remainder;[5] and payments by the widow of the mortgagor, while in possession under her right of dower, prevent the statute running against the mortgagee in favor of the heirs at law.[6]

But a payment made by a mortgagor after he has sold or mortgaged the premises to another will not repel the presumption of payment arising from the lapse of twenty years from the time when the mortgage became due, so far as the subsequent purchaser or mortgagee is concerned. Neither does a lease from a mortgagee[7] to his mortgagor more than twenty years after the maturity of the mortgage debt affect the rights of a subsequent purchaser or mortgagee of the property.[8]

If the mortgagee be a tenant for life of the mortgaged estate, and as such receives the rents, the statute does not run against the

[1] See Pears *v.* Laing, L. R. 12 Eq. 51, 54; Roddam *v.* Morley, 1 De G. & Jo. 1. In this case, it was held that a payment of interest by the tenant for life of a devised estate keeps a specialty alive against the persons entitled to the remainder. Lord Cranworth, in the Court of Appeals, said: "Who is affected by the payment? Does it operate against the party only by whom the payment is made? or does it affect all the other parties liable? Does it merely enable the creditor to sue the party by whom the payment was made, or does it set free the action generally? I have come to the conclusion that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved not only against the party making the payment, but also against all other parties liable on the specialty." He further says, that as the statute does not so restrict the effect of the payment the court cannot restrict it.

[2] Ward *v.* Carttar, L. R. 1 Eq. 29.

[3] Chinnery *v.* Evans, 11 H. L. Ca. 115.

[4] Schmucker *v.* Sibert, 18 Kans. 104.

[5] Roddam *v.* Morley, *supra*; Toft *v.* Stephenson, 1 De G., Mac. & G. 40; Pears *v.* Laing, *supra*.

[6] Ames *v.* Mannering, 26 Beav. 583.

[7] New York Life Ins. & Trust Co. *v.* Covert, 29 Barb. (N. Y.) 435.

[8] Jarvis *v.* Albro, 67 Me. 310.

mortgaged title.[1] The concurrence of the tenancy for life, and the right to receive the interest on the mortgage in the same individual, renders it impossible for him to make any acknowledgment of that title to himself; but it being his duty as such tenant to keep down the interest, the law will presume that he does so out of the rents received by him. This rule being in favor of the remainder-men, they cannot afterwards be permitted to contend that the interest thus deemed to have been kept down for their benefit was not, in fact, paid, and that the right to enforce the mortgage is barred by the statute; under such circumstances the statute of limitations cannot be applied against the mortgage. The presumption of payment or release of the mortgage arising from twenty years' possession by the mortgagor may be repelled by evidence of the payment of interest, of a promise to pay, or of an acknowledgment that the mortgage is still existing.[2]

The receipt of rents and profits by one holding only an equitable mortgage has been held to be equivalent to a part payment.[3]

1199. If land subject to a mortgage be sold to different purchasers, one of whom pays the entire interest for more than twenty years without calling on the purchaser of another portion for contribution, the former cannot, upon purchasing the mortgage, enforce it against the latter or his grantee.[4] After such a lapse of time, by analogy to the statute of limitations, it would seem that a court of equity should conclusively presume that the parties had agreed the latter's portion should not be regarded as subject to the mortgage. Of course the holder of the mortgage, having received the payments exclusively from one part-owner, would not by that fact alone be precluded from subjecting to a foreclosure the whole property which his mortgage covered. He would have no reason to know or inquire from whom the interest came, or to whom the mortgagor had sold the land. But the conduct of the grantees of the equity of redemption in respect to the interest has a direct bearing upon the question, which of them is liable for the payment of the principal.

1200. The payment of taxes by the owner of the equity of

[1] Wynne *v.* Styan, 2 Ph. 303; Lord Carbery *v.* Preston, 13 Ir. Eq. 455; Burrell *v.* Earl of Egremont, 7 Beav. 205.

[2] Hough *v.* Bailey, 32 Conn. 288; Bacon *v.* McIntire, 8 Met. (Mass.) 87; Howland *v.* Shurtleff, 2 Ib. 26; Ayres *v.* Waite, 10 Cush. (Mass.) 72.

[3] Brocklehurst *v.* Jessop, 7 Sim. 438.

[4] Pike *v.* Goodnow, 12 Allen (Mass.), 472.

redemption does not in any way contribute to make his possession hostile to the mortgagee; nor does it give him any rights against the mortgagee under a statute making seven years' payment of taxes with a record title, or a colorable one and possession, a bar to any adverse rights or proceedings; for it is his duty while in possession to pay the taxes, and the mortgagee may well regard the payment as made in his interest and not in subversion of it.[1]

1201. A purchaser assuming the payment of a mortgage recognizes it as a subsisting incumbrance, and cannot set up the statute of limitations against it until twenty years from that time has elapsed. His grantee is also bound by such admission to the same extent that he was himself bound.[2] A recital in a deed or mortgage that the premises are subject to a prior mortgage has the same effect.[3] It constitutes an admission that removes the bar of the statute as to parties to the deed.

1202. The mortgagor's grantee has no greater rights against the mortgagee than the mortgagor himself. A purchaser with actual notice of the mortgage, or constructive notice by means of a registry, can avail himself of the presumption of payment from lapse of time only when the mortgagor could avail himself of it under the same circumstances. The grantee succeeds to the estate and occupies the position of his grantor. He takes subject to the incumbrance; and his title and possession are no more adverse to the mortgagee than was the title and possession of the mortgagor.[4] The purchaser is bound by the acts and declarations of the mortgagor in respect to the mortgage while he retains the equity of redemption or any part of it; as, for instance, the purchaser of a part of the mortgaged premises cannot claim a presumption of payment of the mortgage from lapse of time when this presumption is repelled by payments of interest made by the mortgagor within twenty years, or by his admission within this time that the mortgage was then subsisting.[5] A

[1] See §§ 679, 680; Medley *v.* Elliott, 62 Ill. 532; Wright *v* Langley, 36 Ill. 381; Hagan *v.* Parsons, 67 Ill. 170.

[2] See § 744; Harrington *v.* Slade, 22 Barb. (N. Y.) 161; Schmucker *v.* Sibert, 18 Kans. 104.

[3] Palmer *v.* Butler, 36 Iowa, 576.

[4] Medley *v.* Elliott, 62 Ill. 532; Waterson *v.* Kirkwood, 17 Kans. 9.

[5] Heyer *v.* Pruyn, 7 Paige (N. Y.), 465; Hughes *v.* Edwards, 9 Wheat. 489. Mr. Justice Washington upon this point said: "It is insisted that, although these acknowledgments may be sufficient to deprive the mortgagor of a right to set up the presumption of payment or release, they cannot affect the other defendants, who purchased from him parts of the mort-

purchaser from the mortgagor stands in no better position than the mortgagor himself as to gaining title by possession and lapse of time, if the mortgage be recorded. The record is notice of the mortgage to a subsequent purchaser; and the mere fact that he has had actual possession under his purchase for the statute period of limitation is no bar to a foreclosure of the mortgage.[1]

But when a note and mortgage are once barred, although the mortgagor may by a subsequent part payment, promise, or acknowledgment revive the mortgage, so far as it affects his own interest in the premises, he cannot revive it as against his grantee, or any other parties who have acquired interests in the premises prior to such revivor.[2]

In California, however, it is the settled doctrine that the mortgagor has no power by stipulation to prolong the time of payment of his mortgage as against others who have acquired interests in the equity of redemption, either as subsequent incumbrancers or purchasers of the equity of redemption;[3] as against them he can neither suspend the running of the statute of limitations by an express waiver nor by his voluntary act in absenting himself from the state.[4]

1203. The statute of limitations does not discharge the debt or extinguish the right, but only takes away the remedy. This is the rule even in California and other states where it is held, as already noticed, that when the debt is barred the mortgage is also rendered unavailable. The debt and the mortgage are distinct causes of action, and distinct remedies may be pursued upon them.[5] The recent English Statutes of Limitations, beginning with that of William IV., operate by their direct terms as a bar to the right, and not like the statute of James I., upon which the statutes in this country are generally founded, as a bar to the remedy only.[6] The effect, therefore, of the new enact-

gaged premises for a valuable consideration. The conclusive answer to this argument is, that they were purchasers with notice of this incumbrance."

[1] Thayer *v.* ramer, 1 McCord (S. C.) Ch. 395; Mitchell *v.* Bogan, 11 Rich. (S. C.) 686, 706; Wright *v.* Eaves, 5 Rich. Eq. (S. C.) 81.

[2] Schmucker *v.* Sibert, 18 Kans. 104.

[3] Sichel *v.* Carrillo, 42 Cal. 493; Barber *v.* Babel, 36 Cal. 11; Lent *v.* Shear, 26 Cal. 361.

[4] Wood *v.* Goodfellow, 43 Cal. 185. The authority and correctness of this decision is denied in Waterson *v.* Kirkwood, 17 Kans. 9; Schmucker *v.* Sibert, 18 Kans. 104; Clinton County *v.* Cox, 37 Iowa, 570.

[5] Sichel *v.* Carrillo, 42 Cal. 493; Low *v.* Allen, 26 Cal. 141; Lent *v.* Shear, 26 Cal. 361.

[6] Beckford *v.* Wade, 17 Ves. 87; In-

ments in England is not simply to exclude the recovery, but to transfer the estate.[1] "This," says Lord St. Leonards, "is a great improvement."[2] This change in the statute does not affect the questions under consideration, inasmuch as the recent acts have contained special provisions relating to mortgages. In America the statutes of limitations being generally founded upon the earlier English statutes, the same doctrine, that the effect of the statutes is merely to take away the remedy and not to extinguish the debt, which prevailed in England under those statutes, prevails here as well.[3]

1204. Though the debt be barred the lien may be enforced. The fact that a debt secured by a mortgage is barred by a statute of limitations does not necessarily, or as a general rule, extinguish the mortgage security, or prevent the maintaining of an action to enforce it.[4] The statute of limitations does not in any

corporated Society *v.* Richards, 1 Dru. & War. 258, 289; 2 B. & Ad. 413; 1 B. & Ald. 93.

[1] 3 & 4 Will. 4, c. 27, § 34; 37 & 38 Vict. c. 57. See per Lord St. Leonards, in Dundee Harbor *v.* Dougall, 1 Macq. H. L. C. 321.

[2] Charley's Real Prop. Acts, 3d. ed. p. 26.

[3] Waltermire *v.* Westover, 14 N. Y. 16; Pratt *v.* Huggins, 29 Barb. 277. In this case Mr. Justice Hogeboom said: "It is said that the note, from the lapse of time, is presumed to be paid. Not altogether so; for the law allows a suit upon it, and a recovery, unless the statute of limitations is pleaded. It is therefore, at most, but a presumption; suffered to be overthrown, it is true, only in one way, and that is by proof of payment thereon, or recognition thereof, in the way pointed out in the statute. This, however, as before stated, only acts upon the remedy."

[4] Higgins *v.* Scott, 2 B. & Ad. 413; Spears *v.* Hartly, 3 Esp. 81; Thayer *v.* Mann, 19 Pick. (Mass.) 536; Eastman *v.* Foster, 8 Met. (Mass.) 19; Crain *v.* Paine, 4 Cush. (Mass.) 483; Sturges *v.* Crowninshield, 4 Wheat. 122; Hughes *v.* Edwards, 9 Wheat. 489; Union Bk. of Louisiana *v.* Stafford, 12 How. 340; Townsend *v.* Jemison, 9 How. 413; McElmoyle *v.* Cohen, 13 Pet. 312; Elkins *v.* Edwards, 9 Ga. 326; Myer *v.* Beal, 5 Oregon, 130; Henry *v.* Confidence Gold & Silver M. Co. 1 Nev. 619; Read *v.* Edwards, 2 Nev. 262; Mackie *v.* Lansing, 2 Nev. 302; Cookes *v.* Culbertson, 9 Nev. 199; Wood *v.* Augustine, 61 Mo. 46; Kellar *v.* Sinton, 14 B. Mon. (Ky.) 307; Sparks *v.* Pico, 1 McAll. 497; Birnie *v.* Main, 29 Ark. 591; Richmond *v.* Aiken, 25 Vt. 324; Baldwin *v.* Norton, 2 Conn. 163; Hough *v.* Bailey, 32 Conn. 288; Belknap *v.* Gleason, 11 Conn. 160; Cleveland *v.* Harrison, 15 Wis. 670; Wiswell *v.* Baxter, 20 Wis. 680; Whipple *v.* Barnes, 21 Wis. 327; Knox *v.* Galligan, 21 Wis. 470; Kennedy *v.* Knight, 21 Wis. 340; Ohio Life Ins. & Trust Co. *v.* Winn, 4 Md. Ch. Dec. 253; Fisher *v.* Mossman, 11 Ohio St. 42; Gary *v.* May, 16 Ohio, 66; Longworth *v.* Taylor, 2 Cin. Supt. Ct. Rep. (Ohio) 39; Wilkinson *v.* Flowers, 37 Miss. 579; Nevitt *v.* Bacon, 32 Miss. 212; Trotter *v.* Erwin, 27 Miss. 772; Harris *v.* Vaughn, 2 Tenn. Ch. 483; Waltermire *v.* Westover, 14 N. Y. 20; Pratt *v.* Huggins, 29 Barb. 277; Heyer *v.* Pruyn, 7 Paige (N. Y.), 465, in which Chancellor Walworth denies the authority to the contrary of Jackson *v.* Sackett, 7 Wend. (N. Y.) 94; Crooker *v.*

way apply to the mortgage security. It remains in force until the debt which it secures is paid. Payment may be established not only by direct evidence, but also by the presumption of law arising from the lapse of twenty years from the time when the cause of action accrued; a presumption which may be countervailed by evidence tending to show a contrary presumption.[1]

1205. The mortgagee may retain possession till the debt is paid. Although the right to proceed by action on the mortgage is barred, still if the mortgagee can obtain rightful possession of the premises, he may retain them until the debt is paid.[2]

1206. There may be a decree for the deficiency although the debt be barred. A court of equity is not precluded, in a suit for the foreclosure of the mortgage given to secure the debt, from rendering a decree against the mortgagor for any remainder of the debt not satisfied by the sale. This is on the ground that such a decree is an incident to the decree of foreclosure, and that when a court of equity once takes jurisdiction of a case it will retain it for the purpose of complete relief.[3]

1207. In a few states the mortgage lien is discharged when the debt is barred. The statutes in these states limit suits in equity in the same manner as suits at law, and the debt being barred by the statute, the mortgage is in effect extinguished. This is the rule established in California. Chief Justice Field, giving the opinion of the court, in addition to the special ground of the decision founded upon the peculiarity of the statute of limitations of that state, intimates that by the doctrine of mortgages established there, when the debt is barred by the statute of limitation, the mortgage being considered a mere incident to it is also barred, or at least rendered unavailable for any purpose.[4] In

Holmes, 65 Me. 195; Ball *v.* Wyeth, 8 Allen (Mass.), 275. An agreement by the mortgagee to extend the right to redeem, and not to foreclose for a specified time, does not extend the personal liability of the mortgagor beyond the time when it would otherwise be barred by the statute of limitations.

[1] Joy *v.* Adams, 26 Me. 333.

[2] See §§ **715, 716**; Henry *v.* Confidence Gold & Silver M. Co. 1 Nev. 619; Van Duyne *v.* Thayre, 14 Wend. (N. Y.) 233; Phyfe *v.* Riley, 15 Ib. 248.

[3] Birnie *v.* Main, 29 Ark. 591.

[4] Lord *v.* Morris, 18 Cal. 482. Mr. Chief Justice Field said: "The statute of limitations of this state differs essentially from the statute of James I., and from the statutes of limitation in force in most of the other states. Those statutes apply in their terms only to particular legal remedies, and hence courts of equity are said not to be bound by them except in cases of concurrent jurisdiction. In other cases courts of equity are said to act merely by analogy to the statutes, and not in obedi-

fact the mortgage not being regarded as a conveyance in fee, but only a contract creating a lien or charge upon the property, comes within the same general limitation as the note or other obligation secured by it. Just as much as the note it is a "contract, obligation, or liability, founded upon an instrument in writing," within the terms of the statute. The same rule has been established in Nevada, Texas, and Nebraska, upon the ground that the mortgage is a mere security for a debt, and the mortgagor the owner of the land.[1] In Iowa also the mortgage is regarded as a mere incident following the debt, which is the principal thing, for which it stands security, and that therefore the remedy upon the mortgage is barred when that upon the debt is lost.[2]

The statute of limitations of some of these states is wholly unlike that of England and of those states which have adhered to the common law forms of action. The latter statutes apply in terms only to actions at law; and courts of equity in general act merely in analogy to the statutes, and not in obedience to them. But in states where the distinction between actions at law and suits in

ence to them. Those statutes as a general thing also apply, so far as actions upon written contracts not of record are concerned, only to actions upon simple contracts, — that is, contracts not under seal, fixing the limitation at six years, and leaving actions upon specialties to be met by the presumption established by the rule of the common law, that after a lapse of twenty years the claim has been satisfied. In those statutes where specialties are mentioned, as in the statutes of Ohio and Georgia, the limitation is generally fixed at either fifteen or twenty years. The case is entirely different in this state. Here the statute applies equally to actions at law and to suits in equity. It is directed to the subject matter and not to the form of the action, or the forum in which the action is prosecuted. Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties. Thus the statute requires an action 'upon any contract, obligation, or liability, founded upon an instrument of writing,' except a judgment or decree of a court of a state or territory, or of the United States, to be commenced within four years after the cause of action has accrued. . . . . We do not question the correctness of the general doctrine prevailing in the courts of several of the states, that a mortgage remains in force until the debt, for the security of which it is given, is paid. We only hold that the doctrine has no application under the statute of limitations of this state." See, also, Low *v.* Allen, 26 Cal. 141; Lent *v.* Morrill, 25 Cal. 492.

[1] Duty *v.* Graham, 12 Tex. 427; Ross *v.* Mitchell, 28 Tex. 150; Kyger *v.* Ryley, 2 Neb. 20; Peters *v.* Dunnells, 5 Neb. 460; Hurley *v.* Estes, 6 Neb. 386; Henry *v.* Confidence, &c. Co. 1 Nev. 619.

[2] Gower *v.* Winchester, 33 Iowa, 303; Burton *v.* Hintrager, 18 Iowa, 348; Sangster *v.* Love, 11 Iowa, 580; Crow *v.* Vance, 4 Iowa, 434; Green *v.* Turner, 38 Iowa, 112; Newman *v.* De Lorimer, 19 Iowa, 244; Clinton County *v.* Cox, 37 Iowa, 570.

equity is done away with, the statutes of limitation apply equally to both classes of cases; and therefore a suit to foreclose a mortgage must be brought within the time limited for an action upon the note secured by it.[1] A purchaser of the equity of redemption may interpose this defence to the foreclosure of a mortgage, whether the mortgagor does or not.[2]

In equity a mortgage is always regarded merely as a security for the debt. The debt is the principal thing, and the mortgage an incident only. But the note or bond which accompanies the mortgage may also be regarded as an incident or evidence of the debt, especially if the mortgage itself contains a covenant for the payment of it.[3] The doctrine that there can be no remedy upon the mortgage after the remedy upon the note is barred cannot properly rest upon this foundation. If not based upon the express terms of the statute of limitations, it must rest upon the statutory declaration made in a few states, that a mortgage is not to be deemed a conveyance of the land, but only a contract lien upon it.[4] Yet in Illinois when the debt is barred the remedy on the mortgage is barred also; and the decisions are placed upon the ground that the debt is the principal thing; that an assignment of this carries with it the mortgage; that the release of it releases the mortgage; and that by analogy there is no reason why a bar to a recovery on the note should not produce the same effect on the mortgage. It is conceded, however, that when the mortgage itself contains a covenant for the payment of the debt, this being an instrument under seal, although a mortgage note not under seal might be barred under a shorter period of limitation than that required to bar a sealed instrument, the remedy upon the

[1] Chick *v.* Willetts, 2 Kans. 384; Schmucker *v.* Sibert, 18 Kans. 104.

[2] Schmucker *v.* Sibert, *supra.*

[3] Pratt *v.* Huggins, 29 Barb. (N. Y.) 277.

[4] Lord *v.* Morris, 18 Cal. 482. Chief Justice Field, said: "Here a mortgage is regarded as between the parties, as well as with reference to the rights of the mortgagor in his dealings with third persons, as a mere security, creating a lien or charge upon the property, and not as a conveyance vesting any estate in the premises, either before or after condition broken. Here it confers no right to the possession of the premises either before or after default, and, of course, furnishes no support to an action of ejectment, or to a writ of entry for their recovery. The language of the statute is express that it shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession without a foreclosure and sale." And see Jackson *v.* Lodge, 36 Cal. 28; Carpentier *v.* Brenham, 40 Cal. 221; Harp *v.* Calahan, 46 Cal. 222.

mortgage would be barred only by the lapse of the longer period required to bar a recovery on sealed instruments.[1]

On the other hand, so long as the statute does not bar a recovery on the note, it does not bar a foreclosure of the mortgage.[2] If by the non-residence of the mortgagor time be deducted from the period of limitation, so that an action on the debt be not barred, neither is an action to foreclose the mortgage barred.[3]

1208. It is immaterial whether the adverse possession be that of one person for the whole period, or that of several persons holding in succession each for a part of the period, provided the possession be uninterrupted and adverse; but if a period of time intervenes when the possession is not adverse, the statute only runs from the commencement of the last adverse possession.[4]

Moreover, as against the mortgagee under the English statute,[5] the adverse possession must have commenced under the mortgage, so that an occupation previous to the making of the mortgage cannot be added to an occupation afterwards to make up the period of twenty years; therefore it may happen that while the mortgagor is barred from recovery the mortgagee is not.[6] The payment of interest by the mortgagor may prevent the running of the statute against the mortgagee, while the person in possession under the mortgagor holding for more than twenty years without paying rent or acknowledgment of any kind has acquired title against him.

1209. An action to enforce an equitable lien for purchase money is on the contrary barred when the debt itself is barred.[7]

[1] Harris *v.* Mills, 28 Ill. 44; Hagan *v.* Parsons, 67 Ill. 170; Brown *v.* Devine, 61 Ill. 260; Pollock *v.* Matson, 41 Ill. 517.

[2] Schmucker *v.* Sibert, 18 Kans. 104.

[3] Clinton County *v.* Cox, 37 Iowa, 570; Brown *v.* Rackhold (Iowa, Oct. 1878), 7 Cent. L. J. 416.

[4] Emory *v.* Keigham (Ill. 1878), 11 Chicago L. N. 32; Benson *v.* Stewart, 30 Miss. 49.

[5] 7 Wm. 4 & 1 Vict. c. 28.

[6] Palmer *v.* Eyre, 17 Q. B. 366; Baddeley *v.* Massey, 17 Q. B. 373; Ford *v.* Ager, 2 Hurl. & C. 279; 8 L. T. N. S. 546.

[7] Borst *v.* Corey, 15 N. Y. 505. Mr. Justice Bowen said: "There is a material distinction between a mortgage and the equitable lien for the purchase price of land given by law, and also between an action to foreclose a mortgage and one to enforce a lien. The action to foreclose a mortgage is brought upon an instrument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and, by reason of the seal, the debt is not presumed to have been paid until the expiration of twenty years after it becomes due and payable. The six years' limitation has no application to a mortgage. In fact, all instruments under seal are expressly excepted therefrom." To the same effect see Trotter *v.* Erwin, 27 Miss. 772; Littlejohn *v.* Gordon, 32 Miss. 235.

Such a lien arises by operation of law and is not created or evidenced by deed. It must coexist with the debt and cannot survive that.

1210. The statute runs in favor of the mortgagor from the time the mortgagee's right of action accrues. Generally the statute as applied to a mortgage begins to run against the holder of it in favor of the mortgagor in possession from the time the condition of the mortgage is broken, so that a right of action upon it accrues.[1] Unless the time commences to run from the time when the right to foreclose accrues, it could have no commencement except in rare instances, and the right to foreclose might be asserted against the continued possession of the mortgagor at the most remote period. From that time the mortgagor holds subject to the right of the mortgagee to foreclose, and if the mortgagee sleeps upon that right, if any lapse of time is to bar his claim upon the presumption that it has been paid, the period must commence from the accruing of his right of action.

A suit of foreclosure being a proceeding *in rem*, the absence of the mortgagor from the state does not prevent the running of the statute on the mortgagee's right to foreclose. His absence does not interfere with the prosecution of his remedy, or render it less effectual.[2]

1211. The possession of the mortgagor or his grantees is presumed to be subordinate to the mortgage, until it is shown by some act that such possession is inconsistent with the rights of the mortgagee. A mortgage is not barred until the statutory bar of the debt is complete. The possession must be hostile in its inception, and must continue hostile, actual, visible, and distinct.[3] So long as the relation of mortgagor and mortgagee continues, the statute cannot commence to run in favor of the mortgagor or his heirs. The recovery of a judgment on *scire facias* to foreclose a mortgage does not extinguish the relation; until the time of redemption allowed by law after a foreclosure sale has expired, so that the purchaser is entitled to a deed of the premises, the statute does not begin to run.[4]

[1] Nevitt *v.* Bacon, 32 Miss. 212; Benson *v.* Stewart, 30 Miss. 49; Wilkinson *v.* Flowers, 37 Miss. 579.

[2] Anderson *v.* Baxter, 4 Oreg. 105.

[3] Medley *v.* Elliott, 62 Ill. 532; Martin *v.* Jackson, 27 Pa. St. 504; Parker *v.* Banks, 79 N. C. 480.

[4] Rockwell *v.* Servant, 63 Ill. 424; Jamison *v.* Perry, 38 Iowa, 14.

The possession of the mortgagor being in the beginning consistent with the right of the mortgagee, it becomes important to determine when it becomes adverse, and such that the limitation begins to run in the mortgagor's favor. Is it adverse from the time that he ceases to pay interest upon the mortgage debt? "It seems to me," says Lord Denman, Chief Justice, "that it is not so. The possession of the mortgagor is consistent with the right of the mortgagee; and, therefore, the possession is not adverse at any assignable period, unless the jury, from renunciation by the mortgagor, or some other circumstances, are induced to find the fact of adverse possession." [1]

It is not material to make out that the mortgagor's possession from that time is actually adverse to the right of the mortgagee, if it is from that time without recognition of it. It is deemed adverse in law after breach of the condition.[2]

The period of limitation runs of course from the time when the mortgagee's right of action accrues, and not from the date or delivery of the mortgage.[3] When a mortgage is payable in instalments falling due at different times, the mortgagor's possession is not adverse until the maturity of the last instalment. The condition of the mortgage in such case is a continuing one, and the mortgagee may await the maturity of the last note before an entry and sale, or before treating the non-payment of the earlier instalments as a forfeiture of the mortgage.[4]

1212. If, however, the mortgagor has not been in possession of the mortgaged land, the debt being unpaid, the right to foreclose is not barred by the lapse of the statutory period of limitation. This condition of things frequently happens when the mortgaged lands are wild and unimproved. The lapse of thirty years has been held to be no bar to a foreclosure in such a case.[5]

1213. If the mortgage be one of indemnity to a surety, his right of action does not accrue until he has paid the debt which

[1] Jones *v.* Williams, 5 Ad. & El. 291. Mr. Justice Patterson in this case said: "One is much at a loss as to the proper terms in which to describe the relation of mortgagor in possession and mortgagee. In Partridge *v.* Bere, 5 B. & Ald. 604, such mortgagor is held to be tenant to the mortgagee; sometimes he is said to be the bailiff of the mortgagee; and in a late case Lord Tenterden said that his situation was of a peculiar character. But it is clear that his possession is, at all events, not adverse to the title of the mortgagee."

[2] Wilkinson *v.* Flowers, 37 Miss. 579.

[3] Prouty *v.* Eaton, 41 Barb. (N. Y.) 409.

[4] Parker *v.* Banks, 79 N. C. 480.

[5] Chouteau *v.* Burlando, 20 Me. 482.

the mortgage was given to secure him against, and therefore the time of limitation for his bringing an action to foreclose the mortgage commences to run only from that time.[1]

1214. The same rule applies in case of a debt barred by a special statute of limitations. Thus, the rule applies to a particular statute limiting the time within which claims against the estate of a deceased person must be presented or sued. The debt is not paid or satisfied by failure to present or sue it within the time limited; and the remedy on the mortgage may still be pursued.[2]

[1] M'Lean *v.* Ragsdale, 31 Miss. 701.

[2] Sichel *v.* Carrillo, 42 Cal. 493. In this case the mortgage was given to secure the note of another person, so that there was no personal liability of the mortgagor. When the maker of the note and mortgage are the same person, the court say it may be that it would be necessary to present the claim to prevent a bar, and keep the remedy alive as to the debt, in order to uphold the remedy on the mortgage. This, however, would be on account of the exceptional character of the statutes of limitation in that state, and of the exceptional views taken there of the force and effect of a mortgage. The rule stated in the text is of general application, and without any such qualification elsewhere. In Texas, under special requirement of statute, the debt must be presented against the estate of the deceased before any action can be had on the mortgage. Graham *v.* Vining, 1 Tex. 639; Duty *v.* Graham, 12 Tex. 427.

CHAPTER XXVII.

REMEDIES FOR ENFORCING A MORTGAGE.

I. Are concurrent, 1215–1219.
II. Personal remedy before foreclosure, 1220–1226.
III. Personal remedy after foreclosure, 1227, 1228.
IV. Sale of mortgaged premises on execution for mortgage debt, 1229, 1230.
V. Remedy as affected by bankruptcy, 1231–1236.

1. *Are Concurrent.*

1215. The mortgagee may pursue all his remedies concurrently or successively.[1] He may at the same time sue the mortgagor in an action at law upon the note, or other personal debt; may maintain a writ of entry or ejectment to recover possession of the land; and a bill in equity to foreclose the mortgage. Recovery of judgment upon the note does not, without payment, take it out of the mortgage, or bar proceedings to foreclose. The cause of action on the debt is personal against the person and property of the debtor; and the proceedings to foreclose are to enforce the lien upon the debtor's real estate which he has charged with the payment of the debt.

The mortgage and the evidence of debt are usually separate instruments and afford independent remedies. The mortgage may be wholly discharged or released without affecting the personal

Garforth *v.* Bradley, 2 Ves. Sen. 678; Torrey *v.* Cook, 116 Mass. 163; Ely *v.* Ely, 6 Gray (Mass.), 439; Draper *v.* Mann, 117 Mass. 439; Hughes *v.* Edwards, 9 Wheat. 489; Brown *v.* Stewart, 1 Md. Ch. 87; Wilhelm *v.* Lee, 2 Md. Ch. 322; Pratt *v.* Huggins, 29 Barb. (N. Y.) 277; Jackson *v.* Hull, 10 Johns. N. Y. 481; Cross *v.* Burns, 17 Ind. 441; Jones *v.* Conde, 6 Johns. (N. Y.) Ch. 77; Very *v.* Watkins, 18 Ark. 546; Knetzer *v.* Bradstreet, 1 Greene (Iowa), 382; Smith *v.* Shuler, 12 S. & R. (Pa.) 240; Coit *v.* Fitch, Kirby (Conn.), 254; Wilkinson *v.* Flowers, 37 Miss. 579; Wiswell *v.* Baxter, 20 Wis. 680; Whipple *v.* Barnes, 21 Wis. 327; Knox *v.* Galligan, Ib. 470; Banta *v.* Wood, 32 Iowa, 469; Brown *v.* Cascaden, 43 Iowa, 103; Micou *v.* Ashurst, 55 Ala. 607; Stephens *v.* Greene County Iron Co. 11 Heisk. (Tenn.) 71. In the present state of the law, when there is no prohibition by statute, it is competent for the mortgagee to pursue three remedies at the same time. Mr. Justice Swayne, in Gilman *v.* Ill. & Miss. Tel. Co. 91 U. S. 603; Morrison *v.* Buckner, 1 Hemp. 442.

liability of the mortgagor; and on the other hand, the personal liability may be terminated by the statute of limitations, or by a discharge in bankruptcy or insolvency, without extinguishing the mortgage.[1] So long ago as the case of *Burnell* v. *Martin*,[2] Lord Mansfield declared "that it had been settled over and over again that a person in such case is at liberty to pursue all his remedies at once." He may pursue his legal and equitable remedies at the same time; he may foreclose, take possession of the estate, or bring ejectment for it, and sue the mortgagor on his covenant or other obligation for the debt.[3] When not restrained from entering he may maintain ejectment without previous demand of payment, or entry, or notice to quit.[4] After a mortgage is due the mortgagee may at any time without notice or demand of payment take proceedings to collect the debt or to realize his security.[5]

When a mortgage is given by a corporation to secure a large loan it is usual to divide the mortgage debt into numerous bonds or notes which are payable to bearer and are transferred by delivery; and are widely distributed while the mortgaged property is held by trustees for the protection of all the numerous holders. In such case, while the individual bondholders may obtain judgments for their several bonds, they cannot levy execution upon the mortgaged property and acquire a preference over other bondholders secured by the same mortgage.[6] The mortgage security must usually be enforced by the trustees of the mortgage title; though in certain contingencies, as when the trustees neglect or refuse to perform the trust, individual bondholders may institute proceedings to foreclose the mortgage. But they must do this in behalf of all the bondholders.

1216. This rule is an exception to the general principle that a debtor shall not be harassed by a multiplicity of suits for the same debt at the same time. Lord Redesdale[7] states the general rule to be, that where a party is suing in equity he shall not be allowed to sue at law for the same debt. "But the case of a mortgagee is an exception to this rule; he has a right to proceed on his mortgage in equity and on his bond at law at the same

[1] Toplis *v.* Baker, 2 Cox, 123; Thayer *v.* Mann, 19 Pick. (Mass.) 535.

[2] 2 Doug. 401.

[3] Cockell *v.* Bacon, 16 Beav. 158.

[4] New Haven Sav. Bank *v.* McPartlan, 40 Conn. 91.

[5] Letts *v.* Hutchins, L. R. 13 Eq. 176; Harris *v.* Mulock, 9 How. (N. Y.) Pr. 402.

[6] Jones on Railroad Securities, §§ 434, 477.

[7] In Schoole *v.* Sall, 1 Sch. & Lef. 176.

time." There may be some special equity in favor of the mortgagor which will make an exception to this rule;[1] and in some states this right of concurrent action has been restricted by statute.[2]

1217. A mortgagee may maintain a creditor's bill in equity to reach and apply in payment of his debt property of the debtor which cannot be come at to be attached or taken on execution. This remedy is in the nature of an attachment by an equitable trustee process; and there is no reason why it should not be pursued just as the mortgagee might make direct attachment of any property other than the mortgaged estate.[3]

1218. The right to foreclose is not waived or impaired by the recovery of a judgment at law upon the mortgage debt.[4] The causes of action are not legally the same; one is a personal, the other a real action. Obtaining a judgment on the note does not take it out of the mortgage;[5] and while it remains unsatisfied the conditional judgment in the suit to foreclose must be entered the same as if the note had not been the subject of a suit. Nor does a provision in the mortgage, that in case of a breach of the condition the mortgagee may enter and receive the rents and profits for his indemnity, prevent a foreclosure and sale as in other cases.[6]

The fact that the mortgagee has proved his claim against the estate of his deceased mortgagor and obtained an order for its payment does not constitute a bar to a proceeding to foreclose the mortgage.[7]

On the other hand, it is sometimes provided that the mortgage shall not be foreclosed until the personal remedy is first had. A stipulation in such a mortgage, that the property of the makers of the note should be exhausted before foreclosure, is complied with when a judgment has been obtained on the note and the execution has been returned unsatisfied for want of property. The creditor is not bound to try to collect the judgment out of the

[1] Booth *v.* Booth, 2 Atk. 343; Newbold *v.* Newbold, 1 Del. Ch. 310.

[2] See § 1223.

[3] Tucker *v.* McDonald, 105 Mass. 423; Palmer *v.* Foote, 7 Paige (N. Y.), 437.

[4] Duck *v.* Wilson, 19 Ind. 190; O'Leary *v.* Snediker, 16 Ind. 404; Wahl *v.* Phillips, 12 Iowa, 81; Thornton *v.* Pigg, 24 Mo. 249; Karnes *v.* Lloyd, 52 Ill. 113; Vansant *v.* Allmon, 23 Ill. 33; Banta *v.* Wood, 32 Iowa, 469.

[5] See § 936.

[6] Harkins *v.* Forsyth, 11 Leigh (Va.), 294.

[7] Simms *v.* Richardson, 32 Ark. 297.

equities of the judgment debtors in the mortgaged premises, or out of other property, when these are wholly insufficient.[1]

1219. Subsequent payment will discharge both the judgment against the person and that against the property.[2] Satisfaction of the debt in whatever way it be made, whether it be upon a judgment at law, or upon a decree in equity made in respect of the same mortgage, satisfies and discharges all the proceedings taken to enforce the debt either against the person or the property.[3]

Although as a general rule a mortgagor upon payment of the mortgage is entitled to have the property restored or released to him, yet this right cannot be claimed after a sale under a power when suit is brought upon the mortgage debt for a balance remaining unsatisfied by the sale.[4]

2. *Personal Remedy before Foreclosure.*

1220. The holder of the note and mortgage is not required first to foreclose the mortgage, but may bring his action on the note alone. The fact that the mortgagor has sold the mortgaged premises to a third person subject to the mortgage debt does not change the right of the holder to pursue the personal remedy. The debt is the primary obligation between the parties, and the note is the primary evidence of that debt.[5] The giving of a mortgage or other security for a subsisting debt does not extinguish or merge the personal liability. But of course it is competent for the parties to agree that the mortgagee shall look only to the security for his reimbursement, and that the debtor shall be absolved from all personal obligation.[6] Where a mortgage is made to secure a note, but contains a stipulation that "general execution shall not issue herein," the remedy is limited to the property alone.[7]

Even a surety of a note of his principal secured by a mortgage of land of the principal has no right to demand that the holder of the note shall first exhaust the security before maintaining an action on the note against the surety.[8]

[1] Riblet *v.* Davis, 24 Ohio St. 114.

[2] Ely *v.* Ely, 6 Gray (Mass.), 439. See § 904.

[3] Fairman *v.* Farmer, 4 Ind. 436.

[4] Rudge *v.* Richens, L. R. 8 C. P. 358. A plea to this effect was struck out as bad and dishonest.

[5] Lichty *v.* McMartin, 11 Kans. 565; Vansant *v.* Allmon, 23 Ill. 30.

[6] Ball *v.* Wyeth, 99 Mass. 338.

[7] Kennion *v.* Kelsey, 10 Iowa, 443.

[8] Allen *v.* Woodward, 125 Mass. 400.

That the equity of redemption has been sold on execution for other indebtedness does not deprive the mortgagee of his right to sue the mortgagor on the mortgage note. The purchaser at such execution sale does not become liable to the mortgagor for the mortgage debt, and the mortgagor is not by such purchase released from it either at law or in equity.[1]

The general rule is also in some states changed by statute. Thus, in Minnesota and Nevada, an action cannot be maintained on a promissory note secured by a mortgage on real estate, until the mortgaged security is exhausted.[2] If, in consequence of the illegality of the sale, the property brings less than its value, this is a defence to an action for the balance due on the note.[3]

1221. The holder of the mortgage need not wait to ascertain the amount of the deficiency by a sale under the power, or even that there will be a deficiency, before proceeding to enforce the personal liability of the mortgagor on the note or other debt. He may in the first place sue on the note, or any instalment of it, if due, and attach other property of the mortgagor, and afterwards proceed to sell under the power contained in the mortgage, if the debt be not satisfied. Of course this right must yield to a special agreement of the parties that the personal liability shall not be enforced until the remedy upon the property is first exhausted.

1222. Neither is the pendency of a suit to foreclose the mortgage any bar to an action at law to recover the debt secured by it.[4] If a bill of foreclosure be dismissed on the merits, this is no bar to a suit on the note, for the debt may be due, although the land is not bound.[5] Neither is a judgment against the validity of the mortgage necessarily a bar to a suit upon the note.[6] The mortgage debt may be valid, although the mortgage itself be illegal and void.[7] The suit at law may be before, at the time of, or after the suit in equity.[8]

1223. By statute in some states no proceedings at law can be had for the recovery of the debt after the filing of a bill for

[1] Rogers *v.* Meyers, 68 Ill. 92.

[2] Johnson *v.* Lewis, 13 Minn. 364; Weil *v.* Howard, 4 Nev. 384; Hyman *v.* Kelly, 1 Nev. 179. And see § **1223.**

[3] Lowell *v.* North, 4 Minn. 32.

[4] Copperthwait *v.* Dummer, 18 N. J. L. (3 Harr.) 258.

[5] Longworth *v.* Flagg, 10 Ohio, 300.

[6] Lander *v.* Arno, 65 Me. 26.

[7] Shaver *v.* Bear River, &c. Co. 10 Cal. 396.

[8] Downing *v.* Palmateer, 1 Mon. (Ky.) 68.

foreclosure unless authorized by the court; and if proceedings at law are already pending when the bill is filed, although they need not be actually discontinued they must be suspended, unless the authority of the court be obtained to prosecute the suit.[1] This provision limits the prosecution of a suit at law not only against the mortgagor, but against one who has assumed the mortgage debt.[2] Under the statutes of these states, an equitable suit for foreclosure affords complete remedy against all persons liable for the debt, and at the same time for the recovery of a judgment for any deficiency there may be after the sale, and therefore there is no occasion for a suit at law; and to prevent a multiplicity of suits, the court in which the foreclosure suit is pending is given complete control over all the remedies for the collection of the debt, even after all the relief asked for in that suit is exhausted. An application to prosecute a suit at law is addressed to the sound discretion of the court.[3] If persons against whom a judgment for deficiency might have been had in the foreclosure suit have not been made parties to it, a subsequent action at law might properly be refused.[4] If no judgment for a deficiency is asked for, a satisfactory reason for a separate suit must be shown.[5] The fact that a person liable for the debt was not within the jurisdiction of the court when the foreclosure suit was commenced would doubtless be sufficient reason for allowing a separate suit against him for a deficiency.[6]

When a suit at law is pending at the time of commencing the foreclosure suit, and there are advantages in testing in that action

[1] It is provided by statute that the mortgagee shall not at the same time pursue his remedy against the property and against the person — in **Dakota Territory**: R. C. 1877, p. 616. **Indiana**: Revision, 1876, vol. 2, p. 259. **Michigan**: Unless authorized by court. Compiled Laws, 1871, p. 1549. **Nebraska**: Unless authorized. G. S. 1873, p. 656. **New York**: Unless authorized. 3 R. S. 1875, p. 198. **Washington Territory**: Laws, 1859, p. 405. In **Iowa**, if a suit at law on the debt and a suit in equity on the mortgage be brought at the same time in the same county, the plaintiff must elect upon which he will proceed, and the other will be continued at his cost. Code, 1873, § 3320.

[2] Pattison *v.* Powers, 4 Paige (N. Y.) 549; Scofield *v.* Doscher, 72 N. Y. 491. See in connection, Comstock *v.* Drohan, 71 N. Y. 26; Campbell *v.* Smith, 71 N. Y. 26; and comments in 19 Alb. L. J. 383.

[3] Equitable Life Ins. Co. *v.* Stevens (N. Y. Ct. of Appeals), 1 N. Y. Weekly Dig. 465; 63 N. Y. 341; Scofield *v.* Doscher, 72 N. Y. 491.

[4] Suydam *v.* Bartle, 9 Paige (N. Y.), 294; Comstock *v.* Drohan, 8 Hun (N. Y.), 373; 71 N. Y. 26.

[5] Equitable Life Ins. Co. *v.* Stevens, *supra.*

[6] Bartlett *v.* McNeil, 60 N. Y. 53.

the validity of a defence, the court will permit its prosecution,[1] and it will be allowed to proceed when it is necessary in this way to protect the plaintiff's rights.[2] A new suit after the commencement of the foreclosure suit would not generally be permitted until the remedy upon the decree obtained has been exhausted.[3]

In the same states if a judgment at law has already been obtained before the filing of the bill to foreclose, no proceedings can be had upon this until the remedy upon the judgment has been exhausted.[4] A bill which shows that judgment has been obtained on one of the mortgage notes and nearly paid, but does not show that an execution had been issued and returned unsatisfied, cannot be maintained unless a decree as to that note be waived.[5] The court would not make a decree against a defendant when it appears that the execution has not been returned unsatisfied, although he has allowed it to be taken as confessed against him.[6] On the other hand after a decree has been entered in a foreclosure suit, proceedings at law to recover the debt are prohibited unless leave of court be obtained.[7]

1224. Decree of foreclosure before sale no bar to suit. — Although there has been a decree of foreclosure and sale of the mortgaged property, the holder of the mortgage debt is not precluded from instituting a suit at law upon it before the sale, and while the decree is under the control of the court rendering it, for the decree or the sale under it may be set aside. Of course an action so commenced may be defeated by the subsequent sale of the property and satisfaction of the debt from the proceeds. Until that happens the debt remains precisely the same; and if there be no sale, or the sale be set aside, the action may be prosecuted to judgment.[8] Until the sale is consummated there is no absolute satisfaction. When the sale is complete it relates back to the day of sale, and any proceedings then pending upon the note or other debt are then defeated.[9]

[1] Suydam *v.* Bartle, 9 Paige (N. Y.), 294; Comstock *v.* Drohan, 8 Hun (N. Y.), 373; 71 N. Y. 9.

[2] Thomas *v.* Brown, 9 Paige (N. Y.), 380; and see Engle *v.* Underhill, 3 Edw. (N. Y.) Ch. 249.

[3] Nichols *v.* Smith, 42 Barb. (N. Y.) 381; Scofield *v.* Doscher, 72 N. Y. 491,

[4] See Shufelt *v.* Shufelt, 9 Paige (N. Y.), 137; North River Bank *v.* Rogers, 8 Ib. 648.

[5] Dennis *v.* Hemingway, Walker (Mich.) Ch. 387.

[6] Grosvenor *v.* Day, Clarke (N. Y.), 109; Shufelt *v.* Shufelt, *supra.*

[7] In **New York**: 2 R. S. 191, § 155.

[8] Morgan *v.* Sherwood, 53 Ill. 171. See **§ 950.**

[9] Morgan *v.* Sherwood, 53 Ill. 171.

1225. Express covenant in mortgage to pay. — The form of mortgage used in England almost always contains an express covenant to repay the money, and frequently no note or bond is used in connection with the mortgage. The loan is then a specialty debt, and the mortgagee has a personal remedy by action upon the covenant.[1] This covenant is extended also to the payment of interest. When the mortgage is executed by a trustee, it is usual for the equitable owner to execute the personal covenants, so that the trustee may incur no personal liability.[2] This personal remedy upon the covenant the mortgagee may enforce at the same time that he proceeds with his remedy against the land by a foreclosure suit, or by sale under the power; or he may use the personal covenant, after he has realized what he can from the land, for the deficiency.[3]

Although there be no note or bond or other distinct obligation which the mortgage secures, yet if the mortgage itself contain an express covenant for the payment of a sum of money, the mortgagor thereby becomes liable to a personal action for the debt;[4] unless the covenant implies that there is no personal liability, as in the case of a trustee covenanting for the repayment out of the money that may come into his hands from the mortgaged property, or from money that he may otherwise receive in such official capacity.[5]

If there be no personal obligation and no personal covenant in the mortgage, then the only remedy is against the property mortgaged.[6] The proviso or condition in a mortgage that the deed shall be void if the mortgagor pay a sum of money, or perform some other act, is no ground for a personal action;[7] and it would seem that a mere acknowledgment of the debt would not be.[8]

A covenant for the payment of the debt may be implied from a stipulation for payment on a certain day; or from an admission of liability for the payment of it.[9] When the debt was not evi-

[1] See §§ **72, 678**; Mathew *v.* Blackmore, 1 H. & N. 762; 26 L. J. Ex. 150; Browne *v.* Price, 4 C. B. N. S. 598; L. J. C. P. 290.

[2] 1 Prideaux Conv. 570, 7th ed.

[3] Brown *v.* Cascaden, 43 Iowa, 103.

[4] Elder *v.* Rouse, 15 Wend. (N. Y.) 218.

[5] Mathew *v.* Blackmore, 1 H. & N. 762.

[6] Culver *v.* Sisson, 3 N. Y. 264; Weed *v.* Covill, 14 Barb. (N. Y.) 242; Coleman *v.* Van Rensselaer, 44 How. (N. Y.) Pr. 368; Gaylord *v.* Knapp, 15 Hun (N. Y.), 187.

[7] Smith *v.* Stewart, 6 Blackf. (Ind.) 162; Drummond *v.* Richards, 2 Munf. (Va.) 337.

[8] Scott *v.* Fields, 7 Watts (Pa.), 360.

[9] Hart *v.* Eastern Union Railway Co. 7

denced by a note, but the mortgage contained a recital that the mortgagor was "justly indebted" in a certain sum, it was held that the mortgagee might maintain an action upon the debt without first foreclosing the mortgage, although the mortgage contained the further covenant that if, from any cause, said property should fail to satisfy said debt the mortgagor would pay the deficiency.[1]

1226. Circumstances that exclude personal remedy. — The holder of a mortgage may be debarred from resorting to the personal liability of the mortgagor by reason of equities or agreements between the parties of which the holder has knowledge; as when the owner of land having mortgaged it subsequently sold the equity of redemption by a deed which stipulated that the grantee should assume and pay the mortgage, and took back a second mortgage to himself reciting this stipulation. The assignee of the second mortgage, who also took an assignment of the first mortgage, was not allowed to sue the first mortgage note.[2]

A mortgagee may lose his right to sue the mortgagor for the debt by releasing the security to a subsequent purchaser of the property. Such was the case when a mortgagee concurred with a purchaser of the equity of redemption in a sale of the property, and allowed the purchaser to receive the purchase money; he was not allowed afterwards to sue the original mortgagor for the debt.[3] When the mortgagor, with the knowledge of the mortgagee, sells the mortgaged estate to one who assumes the payment of the mortgage debt, his relation to the mortgagee is thenceforth that of a surety of the mortgage debt. The property is moreover the primary fund for the payment of the debt, and a release to the purchaser, or an extension of the time of payment, may discharge the mortgagor.[4]

When a mortgage is made to secure the debt of another, and it does not by its terms or otherwise impose any personal liability upon the mortgagor, he is not personally bound for the debt, and there can be no general execution against him.[5]

Exch. 246; 8 Ib. 116; Marryat *v.* Marryat, 28 Beav. 224; Saunders *v.* Milsome, L. R. 2 Eq. 573. But it is provided by statute in several states that no covenant for payment shall be implied, § **678**.

[1] Newbury *v.* Rutter, 38 Iowa, 179.

[2] Swett *v.* Sherman, 109 Mass. 231.

[3] Palmer *v.* Hendrie, 28 Beav. 341; S. C. 27 Beav. 249.

[4] §§ **740–742**.

[5] Chittenden *v.* Gossage, 18 Iowa, 157; Deland *v.* Mershon, 7 Iowa, 70, was a case in which one of the mortgagors was per-

No personal judgment can be rendered against the wife of the mortgagor, when it is not alleged that the debt is one for which her separate estate is liable.[1]

3. *Personal Remedy after Foreclosure.*

1227. Suit for deficiency after a sale under power. — If an action at law on the debt be pending at the time of a sale under the mortgage, there can be no judgment if the proceeds of the sale equal or exceed the whole mortgage debt; but if the proceeds be insufficient to pay the debt, there may be judgment for the balance after deducting the proceeds of sale.[2] Where suit is brought upon certain instalments of a note, and subsequently the mortgaged property is sold for a less sum than the whole mortgage debt, the mortgagee is not obliged to apply the proceeds of the sale to the payment of the instalments first due, and sought to be recovered in the action at law. He has the right to appropriate the amount so received to the payment of either instalment.[3] The holder of the mortgage being entitled to recover the full amount of the mortgage debt, if there be a deficiency after foreclosure of the mortgage, either by suit or under a power of sale, he may maintain an action on the debt for what remains due;[4] and a judgment for the deficiency does not open the sale and authorize the debtor to redeem.[5] A sale under a power bars the equity of redemption as effectually as does a foreclosure and sale by decree of court.

1228. Suit at law for deficiency after sale under decree in equity. — If the plaintiff has not taken a judgment in the foreclosure suit for any deficiency there may be after the sale of the property, he may afterwards recover the balance of the debt remaining unsatisfied in a suit at law upon the bond or note.[6] The foreclosure operates as a payment of the debt to the amount received from the sale, or to the value of the property in case of a foreclosure without sale.[7]

sonally liable. New Orleans Canal Co. *v.* Hagan, 1 La. Ann. 62.

[1] McGlaughlin *v.* O'Rourke, 12 Iowa, 459.

[2] See § 953, and chapter xl; Wing *v.* Hayford, 124 Mass. 249.

[3] Draper *v.* Mann, 117 Mass. 439.

[4] Marston *v.* Marston, 45 Me. 412.

[5] Weld *v.* Rees, 48 Ill. 429.

[6] See chapter xxxviii; Globe Ins. Co. *v.* Lansing, 5 Cow. (N. Y.) 380; Lansing *v.* Goelet, 9 Ib. 346; Porter *v.* Pillsbury, 36 Me. 278; Stevens *v.* Dufour, 1 Blackf. Ind. 387; Watson *v.* Hawkins, 60 Mo. 550.

[7] § 953; Johnson *v.* Candage, 31 Me. 28; Hunt *v.* Stiles, 10 N. H. 466; Bassett

Where a sale of the whole of the mortgaged premises was made in satisfaction of the first instalment of the mortgage, the usual clause of the decree, allowing the plaintiff to apply for a further order of sale upon the falling due of the subsequent instalment, and for an execution for any deficiency, became inoperative and was no bar to a personal action against the mortgagor for the subsequent instalment. After the sale of all the property, the only remedy remaining is the enforcing of the personal liability of the mortgagor upon a note or instalment of debt subsequently falling due, and there could be no further order of sale, and therefore nothing on which there could properly be a further decree. The only remedy is by suit at common law.[1] This cannot be maintained until the debt is due and payable by its terms.[2]

4. *Sale of Mortgaged Premises on Execution for Mortgage Debt.*

1229. Generally a mortgagee cannot, upon a judgment recovered for the debt secured by a mortgage, levy the execution upon the mortgaged property, though it may be levied upon any other property of the debtor.[3] Such a proceeding would amount to a foreclosure in a way not contemplated by the parties or provided for by law. The levy would therefore be ineffectual, and would leave the mortgage as it stood before,[4] subject to redemption.[5] The mortgagee is just where he begun.[6]

A first mortgagee may sue his mortgage debt and levy execution upon the mortgagor's right to redeem a second mortgage of the same land; for in such case he does not violate the contract contained in, and the relations created by, the mortgage deed.[7]

v. Mason, 18 Conn. 131; Doe *v.* M'Loskey, 1 Ala. 708.

[1] Bliss *v.* Weil, 14 Wis. 35.

[2] Danforth *v.* Coleman, 23 Wis. 528.

[3] Atkins *v.* Sawyer, 1 Pick. (Mass.) 351; Washburn *v.* Goodwin, 17 Pick. (Mass.) 137; Tice *v.* Annin, 2 Johns. (N. Y.) Ch. 130, per Kent, C.; Delaplaine *v.* Hitchcock, 6 Hill, 14; Trimm *v.* Marsh, 3 Lans. (N. Y.) 509; Carpenter *v.* Bowen, 42 Miss. 28; Davis *v.* Hamilton, 50 Miss. 213; Linville *v.* Bell, 47 Ind. 547; Camp *v.* Coxe, 1 Dev. & Bat. (N. C. L.) 52; Goring *v.* Shreve, 7 Dana (N. Y.), 64; Waller *v.* Tate, 4 B. Mon. (Ky.) 529; Powell *v.* Williams, 14 Ala. 476; Young *v.* Ruth, 55 Mo. 515; Barker *v.* Bell, 37 Ala. 354. Now so provided by statute in North Carolina. Code of Remedial Justice, 1876, § 1432. By statute no part of the mortgaged premises can be sold by virtue of an execution for the mortgage debt in New York. Code Civil Procedure, 1877, § 1432; in Indiana Revision, 1876, vol. 2, p. 265, § 640 of Code.

[4] Young *v.* Ruth, 55 Mo. 515; Lumley *v.* Robinson, 26 Mo. 364.

[5] Powell *v.* Williams, 14 Ala. 476; Boswell *v.* Carlisle, 55 Ala. 554.

[6] Thornton *v.* Pigg, 24 Mo. 249.

[7] Johnson *v.* Stevens, 7 Cush. (Mass.) 431.

And for the same reason the indorsee of one of two notes secured by mortgage, to whom no assignment of the mortgage has been made, may levy upon the equity of redemption, to satisfy a judgment recovered by him on the note.[1]

Doubts have even been expressed whether a mortgagee could sell under execution for any other debt due him.[2] But these doubts were not well founded; for, upon such a sale the sum bid is the value of the land above the mortgage debt, just as it is in case of a sale made upon an execution obtained by a third person. If a stranger purchases at such sale, the relations of the mortgagor and mortgagee are not disturbed any more than they are when the sale is upon an execution obtained by a stranger. And if the mortgagee purchases, the effect is equally in the one case as in the other to extinguish the mortgage debt.[3]

In some courts, however, it is held that the mortgaged property may be sold under an execution issued upon a judgment for the mortgage debt. In such case not merely the equity of redemption is sold but the entire mortgaged estate, so that the purchaser takes the premises free of the mortgage.[4] Such sale is of course a waiver of the mortgage, which cannot afterwards be foreclosed. If, instead of a sale the mortgagee levy his execution on the land mortgaged for the same debt, and if the debtor neglect to redeem, the estate becomes absolute in the mortgagee notwithstanding the mortgage.[5] A mortgagee may waive his lien on the real estate and levy an execution issued upon a judgment recovered on his mortgage debt upon the same property, just as he might upon any other property of his debtor. In those states in which it is provided by statute that executions shall be levied upon real estate by sale only when the property is subject to mortgage, it may well be that a mortgagee cannot levy his execution by sale of the equity raised by his own mortgage given to secure payment of the same debt; for he cannot waive his security and at the same time treat it as still subsisting and constituting the foundation of an equity. But the holder of a junior mortgage

[1] Crane *v.* March, 4 Pick. (Mass.) 131; Andrews *v.* Fiske, 101 Mass. 422.

[2] Camp *v.* Coxe, 1 Dev. & Bat. (N. C.) L. 52; Thompson *v.* Parker, 2 Jones Eq. (N. C.) 475.

[3] Per Rodman, J., in Barnes *v.* Brown, 71 N. C. 507, 510.

[4] Youse *v.* M'Creary, 2 Blackf. Ind. 243; Freeby *v.* Tupper, 15 Ohio, 467; Hollister *v.* Dillon, 4 Ohio St. 197.

[5] Crooker *v.* Frazier, 52 Me. 405; Porter *v.* King, 1 Greenlf. (Me.) 297.

may in such case sell his debtor's equity growing out of a prior mortgage.[1]

1230. But an execution for the mortgage debt may be levied upon any other land of the debtor, or upon his personal property in the same manner as any other debt.[2]

After a redemption from a mortgage sale, a judgment for the deficiency may be levied upon the same property, although the debtor has other property subject to execution.[3]

5. *Remedy as affected by Bankruptcy.*

1231. Although a discharge in bankruptcy will prevent a judgment for a deficiency on the note or debt, it will not prevent a judgment of foreclosure.[4] The lien of the mortgage is not affected by the proceedings. The assignee takes the property subject to all the legal and equitable rights of the mortgagee and of others.[5] The assignee takes only the rights that the debtor himself had, and must recognize all the equities of other parties which the debtor would be held to recognize in a court of equity. Thus an agreement by the debtor to give a mortgage may be treated as a specific lien upon the land, and a mortgage made in pursuance of the agreement, although made just previous to the debtor's bankruptcy, so that by itself it would be open to objection as a fraudulent preference, by reference to the agreement may be sustained as a valid security.[6] And so a mortgage given a short time prior to the mortgagor's bankruptcy, but in renewal of a security which was not a preference under the bankrupt act, is not open to that objection.[7] Adjudication alone does not divest the bankrupt's title, but this remains in him until the appointment of an assignee. Therefore, where one was adjudged a bankrupt, but no assignee was appointed, and no further proceedings had, for the reason that the debtor compromised with his creditors, giving notes secured by a mortgage, it was held that when a year afterwards he again became involved and an assignee was appointed, the mortgage was valid and might be foreclosed.[8]

[1] Forsyth *v.* Rowell, 59 Me. 131.

[2] Rosevelt *v.* Carpenter, 28 Barb. (N. Y.) 426; Simmons' Hardware Co. *v.* Brokaw, 7 Neb. 405.

[3] Canthorn *v.* Indianapolis & Vincennes R. R. Co. 58 Ind. 14.

[4] See § **1438**; Roberts *v.* Wood, 38 Wis. 60; Brown *v.* Hoover, 77 N. C. 40.

[5] Gibson *v.* Warden, 14 Wall. 244.

[6] Hewitt *v.* Northup, 9 Hun (N. Y.), 543; Burdick *v.* Jackson, 15 N. B. R. 318.

[7] Burnhisel *v.* Firman, 22 Wall. 170.

[8] Robinson *v.* Hall, 7 Benedict, 61

Inasmuch as a mortgage taken by a surety enures to the benefit of the principal creditor, the surety may assign the mortgage to such creditor, and the subsequent discharge of both the surety and the principal debtor does not destroy the lien of the mortgage, or affect the mortgagee's right to foreclose it.[1] But even without such an assignment a court of bankruptcy will enforce the mortgage for the benefit of the creditor to whom the surety has become bound.[2]

If proceedings to foreclose are commenced after the mortgagor has filed his petition in bankruptcy, although no judgment can be had against him personally, a decree may be rendered against the property.[3]

After the assignee has taken actual possession of the mortgaged estate, the mortgagee cannot by an action of ejectment disturb his possession. The possession of the assignee is the possession of the court in bankruptcy, and if the mortgagee would enter he must first obtain permission of that court. If the mortgagee be already in possession he cannot be disturbed by the assignee, except upon redemption of the mortgage. If the assignee, for the reason that the incumbrance is greater than the value of the property, does not assume possession of it, then the bankruptcy proceedings do not prevent the mortgagee from recovering possession of the property from a third person not connected with the assignee. No permission from the bankruptcy court is necessary to authorize the mortgagee in such case to maintain an action of ejectment.[4] Although all the property and rights of the bankrupt pass to the assignee by operation of law, and become vested in him as soon as he is appointed, he is not bound to take possession of all the property. If the property be so incumbered as to be of an onerous or unprofitable character, or if it is liable to become a burden, rather than a profit to the estate, the assignee is not bound to take the property into possession, or to take measures to sell it;[5] but rather it is his duty not to do so. If he elects not to take the property, it remains in the bankrupt. If he does not elect to take possession of the property within a reasonable time, he is deemed to have elected to abandon it. The title of the bankrupt to the equity of redemption is good against

[1] Carlisle *v.* Wilkins, 51 Ala. 371.

[2] Pierce, in re, 2 Lowell, 343; Jaycox, in re, 8 N. B. R. 241.

[3] Cockrill *v.* Johnson, 28 Ark. 193.

[4] Eyster *v.* Gaff, 2 Colo. 228.

[5] McHenry *v.* La Société Française, 95 U. S. 58.

all the world except the assignee, as the presumption is that the property was regarded as onerous, and that the assignee elected not to take it into possession.[1]

1232. In what court the mortgage lien may be enforced. — Although it is now generally held that the state courts may, with the assent of the assignee, be employed not only to ascertain the amount of a mortgage lien, but to enforce it as well, it was formerly held that the only proper tribunal for these purposes was the district court in bankruptcy; and that if the creditor remained outside this court he did so at the risk of being refused the right to enforce his lien in the state court.[2] The commencement of proceedings in bankruptcy at once gives to the court of bankruptcy full and exclusive jurisdiction over all the bankrupt's property, and it retains this jurisdiction so long as the proceedings in bankruptcy are pending. It matters not that these proceedings are in a district and state other than that where the property is situated; the courts of the state where the property is do not thereby acquire any rights over it.[3]

Therefore if proceedings to foreclose a mortgage are instituted in a state court after an adjudication of bankruptcy, they will, upon motion, be stayed until these proceedings are closed. The bankruptcy court may order the assignee to sell the property subject to the mortgage, and thus leave the mortgage to be enforced against the property in the hands of the purchaser. After such sale it would seem that proceedings to foreclose would be no longer stayed. But on the other hand, the court sitting in bankruptcy may authorize the assignee to redeem the mortgage; or may order the entire property to be sold free from the mortgage lien, and that the proceeds be paid into court, in which case the validity of the mortgage is there investigated in determining the distribution of the proceeds, and the purchaser takes the estate discharged of the mortgage.[4]

[1] Amory *v.* Lawrence, 3 Cliff, 523.

[2] Blum *v.* Ellis, 73 N. C. 293. Judge Little, in this case, said: "When we behold the obscurity in which this subject has been involved by the conflicting decisions of different courts, we are inclined to think that it would have been better had Congress witheld entirely from state tribunals all questions touching the bankrupt, his creditors, and his assets."

[3] Markson *v.* Haney, 47 Ind. 31.

[4] Markson *v.* Haney, 47 Ind. 31; Newman *v.* Fisher, 37 Md. 259; Brigham *v.* Claflin, 31 Wis. 607; Voorhies *v.* Frisbie, 25 Mich. 476. In like manner bankruptcy stays proceedings in a state court to enforce a mechanic's lien; Clifton *v.* Foster, 103 Mass. 233; or to set aside a fraudulent conveyance. Gilbert *v.* Priest, 65 Barb. 444, overruling S. C. 63 Barb. 339.

The state courts, however, have *primâ facie* jurisdiction to foreclose mortgages, although the suits for the purpose are commenced after the adjudication in bankruptcy. The provisions of the bankrupt law that the property covered by a mortgage shall be sold in such manner as the bankruptcy court shall direct, are for the benefit and protection of the unsecured creditors represented by the assignee, and he may, for himself and them, waive such benefit and permit the property to be sold in a suit in a state court.[1] If the assignee submits himself to the jurisdiction of a state court he is bound by its judgment.[2] The jurisdiction of the state courts of suits for the settlement of conflicting claims to property belonging to the estate of the bankrupt is not divested.[3] The mortgagee may, with leave of the bankruptcy court, institute foreclosure proceedings in the state court;[4] or the assignee may sue in a state court to collect the assets.[5] Objection that leave was not given by the bankruptcy court to file a bill of foreclosure will not be sustained, if made a year and a half after the bill was filed, and when the party objecting had in the mean time appeared and answered, especially when the premises were at the time in the possession of a receiver appointed in a former suit in the same court.[6] The homestead of a bankrupt never comes within the jurisdiction of the bankruptcy court, and therefore a creditor having a lien upon that alone may enforce it by suit while the bankruptcy proceedings are pending, without obtaining leave of that court.[7]

1233. Proceedings in bankruptcy against the owner of the equity do not suspend a suit already commenced in a state court for the foreclosure of the mortgage, and unless restrained by injunction from the United States court in bankruptcy, the plaintiff may proceed to judgment and sale of the premises, and the purchaser acquires a good title against the parties, including any assignee who may afterwards be appointed.[8]

If the assignee in bankruptcy does not assume possession of an estate mortgaged by the bankrupt, proceedings to foreclose the

[1] Mays *v.* Fritton, 20 Wall. 414. *In re* Moller, 7 Benedict, 726.

[2] Mays *v.* Fritton, *supra.*

[3] Eyster *v.* Gaff, 91 U. S. 525; Jerome *v.* McCarter, 94 U. S. 734.

[4] McHenry *v.* La Société Française, 95 U. S. 58.

[5] Claflin *v.* Houseman, 93 U. S. 130.

[6] Jerome *v.* McCarter, 94 U. S. 734.

[7] *In re* Sinnett, 4 Sawyer, 250.

[8] Lenihan *v.* Hamann, 55 N. Y. 652; 14 Abb. (N. S.) 274; McGready *v.* Harris, 54 Mo. 137. In the latter case there had been no adjudication prior to the sale

mortgage whenever commenced may, by his tacit consent, go on in the state court.[1]

Upon the institution of proceedings in bankruptcy, and the appointment of an assignee, the bankrupt's property comes under the jurisdiction of the national courts, and the state courts can act no further in relation to it while such proceedings are pending, except with the consent of the bankruptcy court or of its officer, the assignee, in whom the property is vested by the assignment. A suit to foreclose a mortgage upon the bankrupt's property, if brought subsequently, should be brought in a court of the United States, sitting in bankruptcy, and the assignee should be made a party to it. This court may take the entire administration of the bankrupt's estate, and may ascertain and liquidate all liens thereon, and for this purpose may restrain the holder of a mortgage or other lien from proceeding in any suit to enforce such lien; and it is generally proper for the court to do so when the value of the property exceeds the amount secured by the lien, or when the amount or validity of the lien is in doubt.[2] A mortgagee or trustee under a deed of trust will, upon the application of the assignee, be enjoined from selling under a power of sale.[3] If the foreclosure suit is already pending in a state court at the time the bankruptcy proceedings are commenced, it may be allowed to proceed upon making the assignee a party to it. In the case of a voluntary assignment of the mortgaged property after the commencement of a suit to foreclose, it is not necessary to bring in the assignee as a party to the suit; but if the assignment is by operation of law, as in cases of bankruptcy or under the insolvent acts, the assignee should be made a party before further proceedings are had. If he is not made a party, the foreclosure is of no effect as to him, and his equity of redemption remains unimpaired.[4]

1234. If the bankruptcy proceedings are pending in a state other than that in which the mortgaged property is located,

[1] Hatcher *v.* Jones, 53 Ga. 208.

[2] *In re* Iron Mountain Co. of Lake Champlain, 9 Blatchf. 320; *In re* Sacchi, 10 Ib. 29.

[3] Dooley *v.* Va. F. Ins. Co. 2 Hughes, 482.

[4] Sedgwick *v.* Cleveland, 7 Paige (N. Y.), 287, 290; Anon. 10 Ib. 20; Lowry *v.* Morrison, 11 Ib. 327; Deas *v.* Thorne, 3 Johns. (N. Y.) 544; Springer *v.* Vanderpool, 4 Edw. (N. Y.) Ch. 362; Burnham *v.* De Bevorse, 8 How. (N. Y.) Pr. 159; Winslow *v.* Clark, 47 N. Y. 263; Russell *v.* Clark, 7 Cranch, 69; *In re* Winne, 4 Nat. Bank Reg. 5; Eyster *v.* Gaff, 2 Colo. 228, 239.

although the bankruptcy court may exercise extra-territorial jurisdiction, in collecting the estate and adjusting the claims of creditors, yet matters affecting the real estate of the bankrupt are of a local character, and the rights of parties must be determined by the local courts. Therefore it is held that a suit to foreclose a mortgage on the bankrupt's property, situate in another state, may be commenced after he is adjudicated a bankrupt, and prosecuted in the state where the land is situated. The mortgagee is entitled to have a foreclosure of his mortgage, and as he cannot have any remedy in the District Court of the United States in which the bankruptcy proceedings are pending, he is allowed to proceed in the courts of the state where the lands are. The assignee is protected in his rights by being made a party.[1]

1235. Bankruptcy court may order sale subject to the mortgage. — As already observed the bankruptcy court may allow the mortgagee to foreclose his mortgage in the usual way in a state court, or may take upon itself the duty of ascertaining and enforcing the lien by a sale of the mortgaged property. It may also have the mortgaged premises sold subject to the lien, and leave the mortgagee to proceed to a foreclosure against the purchaser; or it may direct a release of the mortgaged premises to the mortgagee in satisfaction of the debt.[2]

If the mortgagee goes into the bankruptcy court, that court must take possession of the mortgaged property and sell it; and in that case this court must determine the order of priority of different liens upon the property, and the rights of the mortgagor under any claims he may set up, as, for instance, his right to a homestead exemption. When the homestead of the debtor has been sold as a part of the mortgaged property, the court has jurisdiction to order the bankrupt to deliver possession to the purchaser upon the bankrupt's refusal to surrender the property to the purchaser.[3]

The District Court in bankruptcy has no jurisdiction of a summary petition by a mortgagee against the assignee to order a sale of the property when it appears that the title of the applicant [4] is

[1] Whitridge *v.* Taylor, 66 N. C. 273. In this case the assignee accepted service and was willing the case should proceed.

[2] *In re* Ellerhorst, 2 Sawyer, 219. And see Clifton *v.* Foster, 103 Mass. 233.

[3] *In re* Betts (U. S. C. C. E. D. Mo. 1879), 7 Reporter, 522.

[4] *In re* Casey, 10 Blatchf. 316.

in dispute or that the estate is in the actual possession of a third person claiming title; as, for instance, when it is in the possession of receivers appointed by a state court.[1]

1236. If a mortgagee desires to prove his claim against the mortgagor's estate in bankruptcy he may release his security to the assignee and prove for the whole of his claim; or he may have the property sold under direction of the Bankruptcy Court, and prove for any balance of his claim remaining unsatisfied; or he may instead have his security valued and prove for the balance after deducting the value of the property.[2] But the mortgagee need not take either of these courses. He may rest upon his security, in which case the discharge of the bankrupt mortgagor constitutes no defence to a subsequent action to foreclose the mortgage[3] so far as the mortgaged property is concerned, but would be a bar to any personal judgment against the bankrupt.

The fact that the mortgagee has proved his claim in bankruptcy does not prevent his foreclosing his mortgage in a state court upon leave granted by the bankruptcy court.[4]

In Illinois, where foreclosure may be had by *scire facias*, the recovery of a judgment in such suit is no defence to a bill in equity to foreclose the same mortgage.[5] The mortgagee may use both these remedies and all others as well, but of course can have but one satisfaction.

[1] Bradley *v.* Healey, 1 Holmes, 451, and cases cited; Knight *v.* Cheney, 5 N. B. R. 305; and see Hayes *v.* Dickinson, 9 Hun (N. Y.), 277; Smith *v.* Mason, 14 Wall. 419.

[2] Bankrupt Act, sec. 1075.

Although the United States Bankrupt Act has been repealed, the sections of this work relating to remedies upon mortgages as affected by that act have been retained in the present edition, not only because they are of use in determining rights under past proceedings, but because they still apply to unfinished proceedings under this act: and because, moreover, much of what has been said about remedies as affected by the Bankrupt Act is equally applicable to remedies as affected by the insolvent acts of the several states, under which there are very few reported decisions.

[3] Pierce *v.* Wilcox, 40 Ind. 70; Wicks *v.* Perkins, 1 Woods, 383; Price *v.* Amis, 58 Ga. 604.

[4] Societe D'Epargnes *v.* McHenry, 49 Cal. 351.

[5] Erickson *v.* Rafferty, 79 Ill. 209.

CHAPTER XXVIII.

FORECLOSURE BY ENTRY AND POSSESSION.

I. Nature of the remedy, 1237, 1238.
II. Statutory provisions, 1239–1245.
III. The entry, 1246–1257.
IV. The possession, 1258.
V. The certificate of witnesses, 1259, 1260.
VI. The certificate of the mortgagor, 1261.
VII. When the limitation commences, 1262.
VIII. Record of the certificate, 1263.
IX. Effect of the foreclosure upon the mortgage debt, 1264.
X. Waiver of entry and foreclosure, 1265.

1. *Nature of the Remedy.*

1237. Foreclosure by means of the mortgagee's entering upon the premises and holding them for a limited time seems to follow naturally from the principle established in equity, that after forfeiture of the condition although the mortgagee may enter, yet the mortgagor shall be allowed within a reasonable time to redeem.[1] The entry serves to give notice to the mortgagor that his right of redemption will be lost, unless he discharges the obligations of his deed. The mortgagee immediately receives the rents and profits, which, as part of his security, should go to him, after the mortgagor's default. This default continuing, the property is applied to the discharge of the debt by becoming the absolute estate of the mortgagee. The length of possession generally required to perfect the mortgagee's title to the property makes the remedy a slow one for obtaining money in discharge of a mortgage debt. But the remedy is inexpensive, and is ready at hand to be applied by the mortgagee himself, while the mortgagor cannot complain that it is an oppressive one.

1238. Where used. — This mode of foreclosure is in use in Maine, New Hampshire, Massachusetts, and Rhode Island, and is the usual remedy in these states to secure the discharge of the mortgage out of the property, except in case of power of sale mortgages, which, by reason of the promptness of the remedy

[1] For the mode of obtaining possession by process of law, see §§ 1276–1316.

afforded by them, have of late come into very general use. The statutory provisions of these states in respect to the entry and the evidence of possession, though similar, are in important details unlike, and therefore a brief statement will be made of these provisions; but the general rules governing the subject being of universal application will be stated under the general divisions of the following sections.

2. *Statutory Provisions.*

1239. In Maine [1] the mortgagee may obtain possession for the purpose of foreclosure, either by process of law or by entering peaceably and openly, if not opposed, in the presence of two witnesses, whose certificate of the fact and time of such entry, signed and sworn to by them before a justice of the peace, must be recorded in the registry of deeds where the mortgage should be recorded, within thirty days after the entry is made; entry may also be made with the consent in writing of the mortgagor or other owner, in which case such consent must be recorded in the same manner as the certificate of witnesses. Possession obtained in either of these modes and continued for the three following years forecloses the right of redemption.[2] The mortgagor and mortgagee may, however, in the mortgage agree upon a less time, but not less than one year, in which the mortgage shall be foreclosed.[3]

1240. Foreclosure by advertisement. — Another mode of foreclosure without entry, but based on the same principle of notice to the mortgagor, is provided for in Maine. The mortgagee gives public notice in a newspaper printed in the county where the premises are situated, if any, or if not in the state paper, three weeks successively, of his claim by mortgage, describing the premises intelligently,[4] naming the date of the mortgage, and stating

[1] There can be no foreclosure in equity in this state. Although the Revised Statutes, c. 96, in terms authorized the Supreme Court to take cognizance, as a court of equity, of "suits for the redemption and foreclosure of mortgaged estates," it was held that the specific provisions of the statute for the foreclosure of mortgages precluded any jurisdiction in equity, and that the language of the statute quoted as to foreclosure in equity was inadvertently used. Chase *v.* Palmer, 25 Me. 341.

[2] Rev. Stat. 1871, c. 90, §§ 3, 4.

[3] Acts, 1872, c. 37.

[4] The description should be sufficient to enable those interested in the premises to identify them with reasonable certainty. On this ground the following was held insufficient: "On the 22d day of June, 1850, Lewis Dela, of Portland, mortgaged to the undersigned certain property particularly

that the condition of it is broken, by reason whereof he claims foreclosure;[1] a copy of this printed notice, with the name and date of the newspaper in which it was last published, is recorded in each registry of deeds in which the mortgage is or ought to be recorded, within thirty days after the last publication of it. Instead of such publication an attested copy of the notice may be served on the mortgagor or his assigns, if in the state, by the sheriff or his deputy, by delivering it to him in hand or leaving it at his place of last and usual abode; when the notice with the sheriff's return is recorded within thirty days after service. If the premises are not redeemed within three years, or within such time not less than one year as the parties have agreed upon, after the first publication, or after the service of the notice, the right of redemption is foreclosed.[2] Under this statute notice by a mortgagee after he has assigned his mortgage is ineffectual.[3] It should then be given by the assignee. Notice by the assignee to be effectual must be given after his assignment has been recorded; if the notice be given before the assignment is recorded and the person entitled to redeem has no actual notice of the assignment, the mortgage will not be foreclosed at the expiration of three years from the time of publication.[4] The mortgage without the record of the assignment is notice to the owner of the equity that the title is in the mortgagee, and he may act upon this assumption, and disregard all claims by other persons;[5] whether by a subsequent record of the assignment the foreclosure would be complete in three years from the time of record is questionable.[6] The notice must describe the premises so intelligibly that those entitled to redeem may know with reasonable certainty what premises are intended.[7] The publication of it is no bar to a subsequent writ of entry to foreclose the mortgage;[8] and it would

described in the deed situated at the corner of Fore and India streets, in this city." Dela *v.* Stanwood, 61 Me. 51.

[1] A notice stating that "the condition had been broken, and now the mortgagees give notice of the same, and that they claim a foreclosure of said mortgage," is sufficient. It may be inferred, though not declared, that the foreclosure is claimed by reason of the breach of condition. Pearce *v.* Savage, 45 Me. 90.

[2] Rev. Stat. 1871, c. 90, §§ 5, 6. Acts, 1872, c. 37.

[3] Cushing *v.* Ayer, 25 Me. 383.

[4] Reed *v.* Elwell, 46 Me. 270.

[5] Mitchell *v.* Burnham, 44 Me. 286.

[6] Reed *v.* Elwell, *supra*.

[7] Chase *v.* McLellan, 49 Me. 375.

[8] Concord Union Mut. F. Ins. Co. *v.* Woodbury, 45 Me. 447; and see Stewart *v.* Davis, 63 Me. 539.

seem to be no bar to an open and peaceable entry by the mortgagee for this purpose.

1241. In New Hampshire[1] a mortgage may be foreclosed by peaceable entry, and continued actual peaceable possession for the space of one year, and by publishing in some newspaper printed in the same county, if any there be, otherwise in some newspaper printed in some adjoining county, three weeks successively, a notice stating the time at which such possession for condition broken commenced, the object of the possession, the name of the mortgagor and mortgagee, the date of the mortgage, and a description of the premises, the first publication to be six months at least before such right to redeem would be foreclosed.

1242. A mortgagee already in possession of the mortgaged premises may publish in some newspaper printed in the same county, if any there be, otherwise in some newspaper printed in some adjoining county, three weeks successively, a notice stating that from and after a certain day, which shall be specified in the notice, and not more than four weeks from and after the last day of publication, such possession of the premises will be held for the purpose of foreclosing the right of the mortgagor and all persons claiming under him to redeem the same, for condition broken, — stating the name of the mortgagor and of the mortgagee, the date of the mortgage, and a description of the premises; and by retaining actual peaceable possession of the premises for one year from and after the day specified in the printed notice foreclosure will be effected.

The affidavit of the party making the entry, and of the witnesses to it, as to the time, manner, and purpose of said entry, and a copy of the published notice verified by affidavit as to the time, place, and mode of publication, recorded in the registry of deeds for the county in which the lands lie, are evidence of the entry and publication.[2]

1243. The provisions of the statute must be strictly followed in order to effect a change of title by foreclosure, and the proof that these provisions have been followed must be such as

[1] G. L. 1878, c. 136, § 14. Entry may also be made by process of law, in which case no publication of notice is necessary, and foreclosure is complete after a continued actual possession for one year. G. L. 1878, c. 136, § 14. Foreclosure may also be had by a bill in equity, which is the mode to be preferred when the matters between the parties are complicated. Aiken *v.* Gale, 37 N. H. 510.

[2] G. S. 1867, c. 122; G. L. 1878, c. 136, §§ 14–16.

the statute makes competent. The affidavit of one witness to the entry,[1] without the affidavit of the party making the entry, is not evidence of the entry. When a copy of the published notice verified by affidavits, properly recorded, is introduced in evidence, it is not necessary to produce the original notice, or the papers in which it was published.[2] It is not necessary that knowledge of the published notice should be brought home to the party interested.[3] Even notice of the mortgagee's entry and possession, under the statute requiring publication of notice, is insufficient without publication.[4] The published notice must show that possession was taken for condition broken, and that the object of such possession is to foreclose the mortgage.[5] A mistake in the notice that the entry was for the purpose of foreclosing "the right in equity of the mortgagee" is fatal, as it is liable to mislead, and the statute must be strictly pursued.[6] The acknowledgment in writing by the mortgagor of the mortgagee's entry and possession is not evidence of actual possession or of a foreclosure, as against a stranger.[7]

1244. In Massachusetts,[8] the mortgagee after breach of the condition may recover possession by action, or may make an open and peaceable entry on the mortgaged premises; and such possession continued peaceably for three years forever forecloses the right of redemption. To make such entry effectual, a certificate in proof thereof must be made on the mortgage deed and signed by the mortgagor or the person claiming under him; or a certificate of two competent witnesses to prove the entry must be made and sworn to before a justice of the peace; and such certificate must within thirty days after the entry be recorded.[9] Prior to

[1] Wendell *v.* Abbott, 43 N. H. 68, and see Storer *v.* Little, 41 Me. 69.

[2] Farrar *v.* Fessenden, 39 N. H. 268.

[3] Howard *v.* Handy, 35 N. H. 323, 375.

[4] Ashuelot R. R. Co. *v.* Elliot, 52 N. H. 387; Deming *v.* Comings, 11 N. H. 474, 484.

[5] Green *v.* Davis, 44 N. H. 71. The notice merely stated that on August 5, 1856, the mortgagee took quiet possession of the premises, by entering on the same, and therefore claims a foreclosure of the mortgage for condition broken.

[6] Abbot *v.* Banfield, 43 N. H. 153, 155.

[7] Worster *v.* Great Falls Co. 41 N. H. 16.

[8] The Supreme Judicial Court has jurisdiction in equity to foreclose mortgages. Gen. Stat. c. 113, § 2. But this jurisdiction is limited to cases where there is not a plain, adequate, and complete remedy at the common law; and consequently foreclosure in equity can seldom be had. A mortgage of a railroad franchise, and property incidental to its exercise, is within the equity jurisdiction of the court, the remedy at law being inadequate. Shaw *v.* Norfolk Co. R. R. Co. 5 Gray, 162.

[9] Gen. Stat. 1860, c. 140, §§ 1, 2.

the statute of 1785 any peaceably entry made by the mortgagee, by himself, without the presence of witnesses and without process of law, was sufficient, provided an actual entry was made for the purpose of foreclosure,[1] followed by open and continued possession. The statute of 1785, and the subsequent one of 1798, made no provision for the recording of a certificate of entry, and it was necessary either that the mortgagor should have actual notice of the entry or that possession should be continued. The record of a memorandum of the entry availed nothing; actual notice only would supply the want of peaceable possession;[2] although an entry in the presence of witnesses was one of the prescribed modes of foreclosing, there was no provision made for taking or preserving the evidence. Under these statutes the fact of entry, which constituted the commencement of the time of foreclosure, could be proved by any competent evidence. The testimony of the witnesses of the entry to the fact and purpose of it was the proof ordinarily made.[3] Although no certificate by them was required, yet it was the common practice to take such a certificate, as a means of preserving the evidence, which, in the lapse of time, would be apt to pass out of the memory of the witnesses. Such certificate verified by the witnesses was competent evidence; and although they might not be able to recall the facts stated in the certificate, their testimony that they signed the certificate, and that they should not have put their names to it except to certify their knowledge of the facts stated, was held to be a sufficient verification.[4]

An entry by the mortgagee upon condition broken was presumed to be for the purpose of foreclosure, unless the contrary appeared;[5] but no such presumption followed an entry before condition broken,[6] and if the possession was commenced before condition broken and continued afterwards, either actual or constructive notice to the mortgagor of the purpose of the mortgagee

[1] Whitney *v.* Guild, 11 Gray, 496; Newall *v.* Wright, 3 Mass. 138; Boyd *v.* Shaw, 14 Me. 58. Statute of 1785, c. 22, § 2, provided that the mortgagor might redeem, "unless the mortgagor or person claiming under him hath, by process of law or by open and peaceable entry made in the presence of two witnesses, taken actual possession thereof and continued that possession peaceably three years."

[2] Thayer *v.* Smith, 17 Mass. 429; Skinner *v.* Brewer, 4 Pick. 468.

[3] Gordon *v.* Lewis, 1 Sumn. 525.

[4] Crittenden *v.* Rogers, 8 Gray, 452; Smith *v.* Johns, 3 Gray, 517.

[5] Taylor *v.* Weld, 5 Mass. 109, 121; Hadley *v.* Houghton, 7 Pick. 29; Skinner *v.* Brewer, 4 Pick. 468.

[6] Erskine *v.* Townsend, 2 Mass. 493; Pomeroy *v.* Winship, 12 Mass. 514.

to hold for a foreclosure was necessary in order to constitute a commencement of the limitation of the right to redeem.[1] If the mortgagee entered under a lease or by other lawful means, and afterwards undertook to hold as mortgagee for the purpose of foreclosure, it was held that he must give notice of his intention to the party entitled to redeem in order that the latter might know when the limitation of his right to redeem began.[2]

The object of the open and peaceable entry, and of the continued possession under it, was to give the mortgagor such notice that he might know when commenced the limitation of the three years, beyond which his right of redemption would cease.

Notice to the mortgagor being the material thing, it was no objection after an open and peaceable entry, such as would necessarily give him actual notice, had once been made, that the possession was not continued by the mortgagee personally. He might occupy by a tenant, and as his tenant the mortgagor might remain in possession.[3]

These decisions under the statutes in force before the Revised Statutes of 1836 introduced the system of giving notice of the entry by requiring a record of the certificate, though not directly applicable now, yet serve to illustrate the force and effect of the present law, which, being generally the same in the several states in which this mode of foreclosure prevails, will be stated under the appropriate divisions of the subject in subsequent sections.

1245. In Rhode Island[4] the right of redemption is barred unless payment of the debt and interest is made within three years next after the mortgagee or other person claiming under him, either by process of law,[5] or by peaceable and open entry made in the presence of two witnesses, has taken actual possession of the mortgaged estate, and continued the same during said term. When possession is taken in the presence of witnesses, they must give a certificate of such possession being taken; and the person delivering possession must acknowledge before a justice of the peace within the town where the estate lies that the same was voluntarily done, which certificate and acknowledgment are recorded.[6]

[1] Scott *v.* McFarland, 13 Mass. 309.
[2] Ayers *v.* Waite, 10 Cush. 72.
[3] Hadley *v.* Houghton, 7 Pick. 29.
[4] In this state foreclosure may be had also by a bill in equity. Gen. Stat. c. 165, § 14.
[5] This is ejectment, or trespass and ejectment. See chapter xxix.
[6] Gen. Stat. c. 162, § 4; c. 165, §§ 4, 5.

The possession must be continued "during said term." It must be accompanied throughout by a right on the part of the mortgagor to redeem, and to maintain a bill for that purpose. But after the owner of the equity of redemption has surrendered possession, an absolute conveyance by him to a third person of a portion of the premises is not such an interruption of possession as will prevent the completion of the foreclosure in three years from the entry.[1]

3. *The Entry.*

1246. In general. — As already stated, under the earlier laws open and visible entry in the presence of witnesses was solely for the purpose of giving notice to the mortgagor that his right of redeeming would be gone in three years. The entry, like a judgment, fixed the time from which the three years began to run, and at the same time gave notice of it. After the adoption of the system of certifying and recording the entry, the registration of the certificate became full constructive notice to all persons of the fact and date of the entry, of the cause and the purpose of it. The entry and possession under it thus became of much less consequence than the certificate, which, being properly made and recorded, effects the foreclosure.

1247. The entry should be made by the person holding the legal title to the mortgage or by his authorized agent. An entry made by an agent of the mortgagee without express authority may be subsequently ratified by him and made effectual. An entry made by an attorney or officer of a corporation without legal authority may be made the act of the corporation by express ratification, or by a recital of it in a subsequent agreement or deed executed by the corporation to the owner of the equity.[2] A person holding two mortgages upon the same land may enter under the first; his possession is under that only, and redemption may be had from that without redeeming from the second.[3]

1248. Upon the death of the mortgagee, the entry should be made by his executor or administrator.[4] His heirs at law cannot make an effectual entry, as the mortgage is personal assets and goes to the personal representative. The mortgagor's right to

[1] Daniels *v.* Mowry, 1 R. I. 151.
[2] Cutts *v.* York Manuf. Co. 18 Me. 190.
[3] Gerrish *v.* Black, 122 Mass. 76.
[4] Gibson *v.* Bailey, 9 N. H. 168; Fifield *v.* Sperry, 20 N. H. 338.

redeem remains unaffected by such an entry, unless possession under it be continued so long that the statute of limitations may be pleaded in favor of the right to redeem.[1] After the foreclosure is complete the legal estate vests in the heirs, subject, like other real estate of the deceased, to be used for the purposes of administration; but until the title is thus made complete in the heirs, they can do nothing with the mortgage or with the premises covered by it.

Although a mortgagee cannot make an effectual entry after he has assigned all his interest in the mortgaged premises, even if he remains in possession,[2] yet after he has quitclaimed to a third person his interest in a portion of them, his entry is sufficient to foreclose the mortgage as to all the premises covered by it, even that portion in the possession of his grantee.[3]

1249. It is the mortgagee's right to foreclose the whole estate embraced in the mortgage; but where the owner of the equity has conveyed a part, there may be a possession and foreclosure of the part not conveyed, though nothing be done to foreclose the rest, and the mortgage will be paid to the extent of the value of the land taken.[4] A mortgagor, however, cannot under any circumstances, except with the consent of the holder of the mortgage, have a part of the mortgaged premises estimated in payment of his debt; and it would seem that without the mortgagor's consent there could be no foreclosure of a part of the premises, and that so long as he has a right to redeem any part he may redeem the whole.[5]

1250. Assignment of the entry. — An entry made by a holder of the mortgage enures to the benefit of any one to whom it may be assigned during the time limited for redemption. If after an entry the mortgage be assigned at the request of the mortgagor to a friend of his to hold for his benefit, the foreclosure is not postponed or prevented unless the mortgage be in fact paid. Where one at the request of the mortgagor, after the foreclosure had been running more than two years, paid the amount due and took an assignment of it, orally agreeing with the mortgagor to hold

[1] Haskins *v.* Hawkes, 108 Mass. 379; Palmer *v.* Stevens, 11 Cush. 147; Fay *v.* Cheney, 14 Pick. 404; Smith *v.* Dyer, 16 Mass. 18.

[2] Sisson *v.* Tate, 109 Mass. 230; Call *v.* Leisner, 23 Me. 25.

[3] Raymond *v.* Raymond, 7 Cush. 605; Colby *v.* Poor, 15 N. H. 198.

[4] Green *v.* Cross, 45 N. H. 574, 582.

[5] Spring *v.* Haines, 21 Me. 126; and see Treat *v.* Pierce, 53 Me. 71.

the mortgage subject to his claim for the amount paid, and to permit the mortgagor to sell the land in lots, paying over the proceeds, and to allow the mortgagor to redeem at any time by paying the amount so advanced with interest, it was held that the foreclosure was not stopped.[1] Even if a purchaser from a mortgagor, after an entry by the mortgagee, pays him the amount of the mortgage and enters into possession, the foreclosure may still go on and be perfected under an agreement with the mortgagee that he should hold the mortgage and consummate the foreclosure.[2] Although one of the notes has been transferred to a third person, an entry by the holder of the mortgage is considered as made for that as well as for the note held by him, and will operate as payment of both, if the premises be of sufficient value;[3] if not of sufficient value, the notes, in the absence of any agreement to the contrary, would be paid *pro rata*. On completion of the foreclosure the mortgagee would hold a proportionate interest in the land in trust for the holder of the other note.

1251. A second mortgagee may enter and take possession for the purpose of foreclosure, as against all subsequent mortgages and the equity of redemption.[4] The second mortgagee may lose his estate, if he does not redeem it from the first mortgage; but as against every other title the foreclosure is as perfect as if the first mortgage did not exist. The entries under the two mortgages are not inconsistent. The second mortgagee holds a constructive possession, which is all that is required, and his certificate of entry is notice to all subsequent parties, and will bar their rights after such possession has continued for three years.[5]

A first mortgagee has the right to retain possession of the estate for the purpose of foreclosing against the original mortgagor and all persons claiming under him. But a second mortgagee has also a right to foreclose against the right to redeem from his mortgage, so that a foreclosure of both mortgages may be going on at the same time. If the first mortgagee, after having taken possession for the purpose of foreclosure, takes a third mortgage or a conveyance of the equity of redemption from the mortgagor, the second mortgagee is still entitled to such a judgment for possession of the mortgaged premises as will enable him to foreclose

1 Capen *v.* Richardson, 7 Gray, 364.
2 Cutts *v.* York Manuf. Co. 18 Me. 190.
3 Haynes *v.* Wellington, 25 Me. 458.
4 Lincoln *v.* Emerson, 108 Mass. 87.
5 Palmer *v.* Fowley, 5 Gray, 545; and see Cavis *v.* McClary, 5 N. H. 529.

the right which the first mortgagee has of redeeming from the second mortgage, subject to the prior right of the first mortgagee, to hold possession for the purpose of foreclosing his mortgage.[1]

A subsequent mortgagee has only an equity of redemption as to prior mortgagees. He may enter and take possession of the mortgaged premises as against the mortgagor; but is himself liable to be ousted of his possession by the entry of a prior mortgagee. A first mortgagee after entry may authorize the mortgagor to occupy as his agent; but the death of the first mortgagee is a revocation of such authority, and the mortgagor cannot by virtue of his agency afterwards hold the premises against a second mortgagee.[2] A mortgagor who gives a second mortgage containing full covenants of warranty and subsequently acquires title to the first mortgage after possession taken under it, cannot hold possession against the second mortgagee, because he is estopped by the covenants of warranty.[3]

1252. A married woman cannot enter to foreclose a mortgage of land, the equity of redemption of which is held by her husband. The statutes removing the disabilities of married women do not allow the adverse relation of debtor and creditor to exist between husband and wife. She could not maintain a writ of entry against her husband, and the process of foreclosure by entry and possession is equally adverse.[4] Her right to enforce a forfeiture of the land in this way revives so soon as a conveyance of it is made by her husband.

1253. The mortgagee may enter at any time after breach of the condition,[5] and he does not lose the right by bringing an action to foreclose; but he may take possession during the two months allowed to the mortgagor under the conditional judgment to pay the amount due.[6] If a writ of possession be subsequently issued upon such judgment, and possession delivered to the mortgagee by virtue of the writ, then the previous entry is waived by the entry under the writ.[7]

1254. An entry upon a part of the land mortgaged by one general description is sufficient,[8] and when several distinct and de-

[1] Cronin *v.* Hazletine, 3 Allen, 324; Doten *v.* Hair, 16 Gray, 149; Palmer *v.* Fowley, 5 Gray, 545; George *v.* Baker, 3 Allen, 326.

[2] Lincoln *v.* Emerson, 108 Mass. 87.

[3] Lincoln *v.* Emerson, *supra.*

[4] Tucker *v.* Fenno, 110 Mass. 311.

[5] See chapter xxv.

[6] Mann *v.* Earle, 4 Gray, 299.

[7] Fay *v.* Valentine, 5 Pick. 418; Fletcher *v.* Cary, 103 Mass. 475, 480.

[8] Lennon *v.* Parker, 5 Gray, 318;

tached parcels in the same county are mortgaged in one deed for the performance of one condition, an entry upon any one is a good entry upon the whole.[1] Even if the mortgagor remains in possession of a part of the premises, and does various acts of ownership, such as blasting, quarrying, and carrying away stone, he does not defeat the entry and possession of the mortgagee. These acts are held to be done in subordination to the title of the mortgagee, whom the mortgagor cannot disseise.[2] The recording of the evidence of entry is notice to all persons of the relation the mortgagor holds to the property; and he is conclusively prevented from holding adversely to the mortgagee.

1255. In making the entry the mortgagee should have the mortgage deed with him, to enable the witnesses to certify that the entry is made under that particular mortgage; but if they certify that the entry is made under the mortgage, the certificate is conclusive of the identity of the mortgage, whether the witnesses have any proper knowledge of it or not.[3]

1256. An entry is peaceable if not opposed by the mortgagor or other person claiming the premises. If it be opposed, the mortgagee must resort to his action at law to recover possession. Though forcibly repelled he cannot resort to the process of forcible entry and detainer.[4] The remedies are confined to those specifically given by statute.

1257. The entry is sufficiently open if made in the presence of two competent witnesses, whose certificate is sworn to and duly recorded within thirty days in the registry of deeds for the county where the land lies.[5] Even though the entry be made in the night-time, and purposely in secret, it is sufficient if the certificate

Spring *v.* Haines, 21 Me. 126; Colby *v.* Poor, 15 N. H. 198.

[1] Bennett *v.* Conant, 10 Cush. 163; Green *v.* Pettingill, 47 N. H. 375; Shapley *v.* Rangeley, 1 Wood. & M. 213. "If a man hath cause to enter into any lands or tenements in diverse townes in one same countie, if he enter into one porcell of lands or tenements which are in one towne, in the name of all the lands or tenements into which he hath right to enter within all the townes of the same countie; by such entrie he shall have as good a possession and seizin of all the lands and tenements whereof he hath title of entrie, as if he had entered indeed into every porcell." Litt. sec. 417. "If the lands lie in several counties," says Coke, "there must be several actions, and consequently several entries." Coke, Litt. 252 *b*.

[2] Hunt *v.* Hunt, 14 Pick. 374.

[3] See Skinner *v.* Brewer, 4 Pick. 468.

[4] Walker *v.* Thayer, 113 Mass. 36; Hastings *v.* Pratt, 8 Cush. 121; Larned *v.* Clarke, 8 Cush. 29; Gerrish *v.* Mason, 4 Gray, 432.

[5] Thompson *v.* Kenyon, 100 Mass. 108.

of the entry be duly sworn to and recorded.[1] No publicity need be given to the entry other than the record of it. Although the mortgagee be already in occupation of the premises, he may make an entry in the presence of witnesses, for the purpose of foreclosure, without giving other notice of it than recording the certificate. After a breach of the condition has given the mortgagee the right to enter, it is for the mortgagor to find out from the registry whether he has entered.[2]

After a breach of the condition of a mortgage, an entry by the mortgagee upon the premises is presumed, in the absence of evidence to the contrary, to have been for the purpose of foreclosure.[3]

4. *The Possession.*

1258. The possession taken is a constructive rather than a literal one. The formal entry being made, the law presumes that possession continues unless its interruption be proved. The mortgagor may be permitted to remain in occupation without in any way defeating the operation of the entry; and the mortgagee need not take the rents and profits. The mortgagor holds in subordination to his mortgagee's paramount right. His possession is the possession of the mortgagee, and not adverse.[4] Even under a statute requiring "actual possession" by the mortgagee, "actual occupation" by him is not required. The occupation may continue in the mortgagor, who will be regarded as a tenant at will of the mortgagee, in whom is the possession. It is only necessary that the possession of the mortgagor or other tenant should not be adverse.[5] In Maine, however, the possession required is equivalent to an actual possession.[6] The mortgagee's formal entry does not amount to anything without continued possession for three years.[7]

[1] Ellis *v.* Drake, 8 Allen, 161; Hobbs *v.* Fuller, 9 Gray, 98.

[2] Davis *v.* Rodgers, 64 Me, 159; Chase *v.* Marston, 66 Me. 271.

[3] Walker *v.* Thayer, 113 Mass. 36; Ayres *v.* Waite, 10 Cush. 72; Taylor *v.* Weld, 5 Mass. 109; Whitney *v.* Guild, 11 Gray, 496; Hunt *v.* Stiles, 10 N. H. 468.

[4] Ellis *v.* Drake, 8 Allen, 161; Fletcher *v.* Cary, 103 Mass. 475; Swift *v.* Mendell, 8 Cush. 357; Bennett *v.* Conant, 10 Cush. 163; Deming *v.* Comings, 11 N. H. 474; Howard *v.* Handy, 35 N. H. 315, 323; Gibson *v.* Bailey, 9 N. H. 172; Kittredge *v.* Bellows, 4 N. H. 424; Hurd *v.* Coleman, 42 Me. 182; Chase *v.* Marston, 66 Me. 271.

[5] Palmer *v.* Fowley, 5 Gray, 545, 546; Swift *v.* Mendell, 8 Cush. 357; Gilman *v.* Hidden 5 N. H. 30.

[6] Chamberlain *v.* Gardiner, 38 Me. 548.

[7] Chase *v.* Marston, 66 Me. 271; Jarvis *v.* Albro, 67 Me. 310.

5. *The Certificate of Witnesses.*

1259. What it must state. — The purpose of the certificate being to give notice to all persons concerned that the mortgagee has entered for foreclosure, its allegation must be definite, and must cover all the matters necessary to effect this change of title. The mortgage to be foreclosed must be identified. The fact of entry and the date of it are the most essential particulars. The purpose of it should be declared;[1] but the manner in which the entry is made is not of material importance so far as the certificate goes. The omission to state in terms that the entry was "open and peaceable" does not make the certificate defective;[2] it is enough to state that it was made in the presence of two witnesses. It seems, however, that it is open to the mortgagor to prove that the entry was not in fact open and peaceable if this be not alleged in the certificate.[3]

1260. The certificate duly made and recorded is conclusive evidence of the acts and statements of the mortgagee with reference to the entry, and its allegations of any fact necessary to establish foreclosure as of an actual entry having been made cannot be controlled by oral evidence.[4] The certificate cannot be contradicted by proof that the mortgagee did not actually go upon the lands. If it omit to state any essential fact, it cannot be

[1] In **Massachusetts** the purpose of the entry after a breach of the condition would be presumed to be for the purpose of foreclosure. See § **1257**. But in **Maine** it is held that a statement that the purpose of the entry is to foreclose the mortgage is essential, though the mortgagee's intention to foreclose may clearly appear. Morris *v.* Day, 37 Me. 386. The certificate in this case concluded thus: "The condition of said mortgage having been broken, the said Day claims to foreclose the same. We, the subscribers, at the request of said Day, went with him on all the premises described in the mortgage deeds, on the sixteenth day of May, A. D. 1839, and saw him enter and take peaceable possession of the premises." This was held ineffectual to establish a foreclosure.

[2] Hawkes *v.* Brigham, 16 Gray, 561; Thompson *v.* Kenyon, 100 Mass. 108.

[3] The form of certificate in general use is as follows: —

"We hereby certify that we were this day present and saw , the mortgagee named in a certain mortgage deed given by , dated , and recorded , make an open, peaceable and unopposed entry on the premises described in the said mortgage, for the purpose by him declared of foreclosing said mortgage for breach of the condition thereof. In witness whereof we hereto set our hands this day of .

"A. B.
"C. D."

This should be sworn to.

[4] Oakham *v.* Rutland, 4 Cush. 172; Swift *v.* Mendell, 8 Cush. 357; Ellis *v.* Drake, 8 Allen, 161; Thompson *v.* Kenyon, 100 Mass. 108, 112.

cured by subsequent testimony of witnesses. All the facts necessary to the foreclosure must appear by the certificate, which is the only proper evidence of them.[1] The certificate is not, however, conclusive evidence that there has been a breach of the condition of the mortgage. Whether there has been a breach or not may be shown by parol evidence.[2]

The certificate of witnesses to prove the entry need not be on the mortgage deed; but may be on a separate paper.[3] The signature of a witness is sufficient if made by his mark.[4]

6. *The Certificate of the Mortgagor.*

1261. When the mortgagor consents to the entry, and makes a certificate[5] of the fact, this is conclusive evidence of it. He is estopped to deny the fact of such entry. It is of no consequence that he continues in occupation of the premises; for after entry he must hold as tenant of the mortgagee, or in subordination to his right of possession.[6] After the mortgagor has conveyed the equity of redemption to a third person, and has no further interest in it, he cannot give a good certificate, although he remains in possession of the premises.[7] If, however, he has taken back a mortgage of the premises on conveying them, he as well as the purchaser should consent to the entry.[8]

7. *When the Limitation commences.*

1262. The limitation of three years commences after the entry has been made and possession acquired for a breach of the condition of the mortgage; and as the law does not take notice

[1] Morris *v.* Day, 37 Me. 386.

[2] Hill *v.* More, 40 Me. 515; Pettee *v.* Case, 11 Gray, 478.

[3] Bartlett *v.* Johnson, 9 Allen, 530.

[4] Thompson *v.* Kenyon, 100 Mass. 108.

[5] The following is a usual form of a mortgagor's certificate: —

"I , the within named mortgagor, hereby acknowledge and certify that , the within named mortgagee, has this day made an open, peaceable, and unopposed entry upon the premises described in the within mortgage, for breach of the condition that it contained. Witness my hand this day of .

"A. B."

[6] Lawrence *v.* Fletcher, 10 Met. 344; Oakham *v.* Rutland, 4 Cush. 172; Bennett *v.* Conant, 10 Cush. 163, 166; Swift *v.* Mendell, 8 Cush. 357.

In **Maine** it is held actual possession must be taken; the mortgagor's consent to entry and declaration that "possession is hereby given," is not sufficient, unless actual entry was made. Chamberlain *v.* Gardiner, 38 Me. 548; Storer *v.* Little, 41 Me. 69; Pease *v.* Benson, 28 Me. 336. In **Massachusetts** this certificate must be made on the mortgage deed. Gen. Stat. 1860, c. 140, § 2.

[7] Sisson *v.* Tate, 109 Mass. 230.

[8] Chase *v.* Gates, 33 Me. 363.

of fractional parts of a day, the continuance of the possession commences the day following that of the entry; so that in the computation of the three years that day is excluded.[1] The possession commences on the day of entry, although the certificate be not recorded till afterwards.[2] If the entry was before breach of the condition, the time limited for redemption does not commence to run until the condition is broken, and notice in writing given by the mortgagee that he will from that time hold the premises for a breach of the condition, or a new and formal entry for breach of the condition is made. A certificate of such notice or new entry must be recorded.[3]

If a mortgagee or his assignee, while a writ of entry for the foreclosure of the mortgage is pending, enter for the purpose of foreclosure, and hold possession of the premises until the writ of possession is issued in the suit, he may justify his possession as "by process of law" under the statute, as commencing at the date of such writ; and the foreclosure will be complete in three years from that time.[4] If the action for possession be brought after an entry *in pais*, and judgment is obtained and possession delivered upon the execution, the three years will run from the time of delivery of possession under the execution.[5]

In Maine, when foreclosure is effected under provision of statute by the publication of notice of an entry to foreclose, the limitation of three years for redemption runs from the first publication of notice.[6]

In New Hampshire the limitation of one year runs from the time of entry, if notice of it is published as provided by statute.[7]

[1] Fuller *v.* Russell, 6 Gray, 128.

[2] Thompson *v.* Vinton, 121 Mass. 139.

[3] Gen. Stat. of Mass, c. 140, §§ 10, 11, adopting the law as laid down in Pomeroy *v.* Winship, 12 Mass. 513; Scott *v.* McFarland, 13 Mass. 309, 313; Ayres *v.* Waite, 10 Cush. 72, 78; Merriam *v.* Merriam, 6 Cush. 91; Erskine *v.* Townsend, 2 Mass. 495; Hunt *v.* Stiles, 10 N. H. 466; Willard *v.* Henry, 2 N. H. 120.

In **New Hampshire**, as already seen, there is a special provision of statute for the publication of a notice by a mortgagee already in possession, stating that from a certain day he will hold for the purpose of foreclosure. Gen. Stat. 1867, c. 122, § 14. See *supra*.

[4] Hurd *v.* Coleman, 42 Me. 182.

[5] Fay *v.* Valentine, 5 Pick. 418; Page *v.* Robinson, 10 Cush. 99, 101.

[6] Rev. Stat. 1871, c. 90, §§ 5, 6. See Holbrook *v.* Thomas, 38 Me. 256.

[7] Gen. Stat. 1867, c. 122, § 14; Howard *v.* Handy, 35 N. H. 315.

8. *Record of the Certificate.*

1263. The certificate, whether made by the mortgagor or by the witnesses, must be recorded within the time specified by statute, to render it effectual as evidence of the entry. The record of the certificate being all the notice of the entry required to be given, it is essential that the record be made as required, or the certificate is wholly inoperative.[1] If the date of the entry be not stated the certificate is insufficient, although this be dated and recorded, for it is not certain that the record was made within thirty days from the time of the entry.[2] When so recorded it is constructive notice of the entry to all persons who claim by any title acquired subsequently to the mortgage.[3] It is sufficient evidence of an eviction of the holder of the equity of redemption to enable him to sustain an action against his grantor for breach of a covenant of warranty.[4]

9. *Effect of the Foreclosure upon the Mortgage Debt.*

1264. The foreclosure when complete operates as payment of the debt to the extent of the value of the land at the time when the foreclosure became absolute.[5] It has the effect of a payment, and makes absolute the title of the mortgagee, although the note secured was void for any reason; as, for instance, a note given for the price of intoxicating liquors sold in violation of law, and therefore void by statute.[6] In such case, although the mortgage could not be enforced, and the owner of the equity of redemption could have defeated it at any time before the foreclosure was completed, yet, the mortgagee having entered and kept possession till the right to redeem is foreclosed, he then has an absolute title; and the land is applied by operation of law to the payment of the debt.

[1] Robbins *v.* Rice, 7 Gray, 202; Southard *v.* Wilson, 29 Me. 56; Potter *v.* Small, 47 Me. 293.

[2] Freeman *v.* Atwood, 50 Me. 473.

[3] Lennon *v.* Porter, 5 Gray, 318, 319; Robbins *v.* Rice, *supra*.

[4] Furnas *v.* Durgin, 119 Mass. 500.

[5] See § **952**; Smith *v.* Packard, 19 N. H. 575.

[6] McLaughlin *v.* Cosgrove, 99 Mass. 4, per Mr. Justice Chapman. "In a case like the present, it is as if the mortgagor had purchased the liquors and paid for them by an absolute conveyance of the land." See § **617**.

10. *Waiver of Entry and Foreclosure.*

1265. By express or implied agreement. — An entry to foreclose, or a foreclosure, when completed, may be waived by the express agreement of the parties, or by facts from which such agreement may be inferred. It is waived by the mortgagee's giving a bond just before the completion of the possession, with condition to discharge the mortgage upon payment of the debt at a future day ;[1] or by giving an agreement that if the debt be paid by a certain time no advantage shall be taken of the foreclosure ;[2] or by stipulating in writing to reconvey whenever the debt should be satisfied out of the rents and profits, or in any other way ;[3] or by promising to allow the mortgagor six months for redemption after the expiration of the regular time limited,[4] or by a statement made a month before the time of redemption would expire that he would give some time, but would not wait long without taking advantage of the mortgage.[5]

In all cases, however, when the waiver is not absolute, but is for a limited time, advantage can be taken of it only within the time limited.[6] The condition of the waiver or extension must be complied with.[7] An express waiver of entry, though executed under seal, is not effectual unless it is delivered to the holder of the equity of redemption.[8]

If the mortgagor remains in occupation of the mortgaged premises for many years after the expiration of the time of redemption, and pays taxes upon them, and interest to the mortgagee, these facts are consistent only with the relation between the parties of mortgagor and mortgagee, and justify the conclusion that the mortgage has not been foreclosed.[9] Giving permission to the mortgagor to cut timber on the mortgaged land, and receiving stampage from him, is not inconsistent with the further prosecution of foreclosure by notice in the newspapers in the mode permitted by statute in Maine, as this mode does not involve the actual possession of the premises by the mortgagor.[10]

1266. An assignment of a mortgage after an entry does

[1] Joslin *v.* Wyman, 9 Gray, 63.
[2] McNiel *v.* Call, 19 N. H. 403, 416.
[3] Quint *v.* Little, 4 Greenl. 495.
[4] Chase *v.* McLellan, 49 Me. 375.
[5] Danforth *v.* Roberts, 20 Me. 307.
[6] Danforth *v.* Roberts, *supra.*
[7] Clark *v.* Crosby, 101 Mass. 184.
[8] Cutts *v.* York Manuf. Co. 14 Me. 326.
[9] Trow *v.* Berry, 113 Mass. 139.
[10] Smith *v.* Larrabee, 58 Me. 361.

not of itself stay the foreclosure. The assignee takes all the benefits of the entry and possession.[1] An assignment of both the mortgage and note, after the expiration of three years from the entry to a subsequent mortgagee, is no release of the foreclosure.[2]

Foreclosure is not waived or postponed by an assignment of the mortgage before the expiration of the time of redemption to one who, at the request of the mortgagor, pays the mortgagee the amount of the mortgage, and agrees orally with the mortgagor to hold the estate subject to such advance for the use of the mortgagor, and to permit him to sell the land in lots and pay over the proceeds, or to redeem on paying the amount so advanced at any time.[3] The assignee in such case takes all the legal rights of the mortgagee and the foreclosure goes on. He holds the property under no resulting trust, because the consideration is wholly paid by him; and under no express trust, because not declared in writing. The agreement does not constitute a mortgage, because it was not made with one from whom an absolute title was taken simultaneously.

But an assignment made for the purpose of preventing a redemption, as, for instance, if it be made immediately before the time of redemption would expire, so that the mortgagor does not know to whom to make payment, may have the effect to keep the redemption open till a tender can be made to the assignee;[4] and even if it be made without such intent, it may have the effect to keep the equity open until the mortgagor can find the assignee and offer to perform the condition.[5]

1267. The waiver, to be effectual, must be by the holder of the mortgage. One who has not acquired any interest in the mortgage cannot by his agreement extend the time of redemption beyond the period when it would otherwise be fore-

[1] Deming *v.* Comings, 11 N. H. 474; Hill *v.* More, 40 Me. 515; Hurd *v.* Coleman, 42 Me. 182; Cutts *v.* York Manuf. Co. 14 Me. 326.

[2] Thompson *v.* Kenyon, 100 Mass. 108. The assignment in this case was by a quitclaim deed for a consideration equal to the amount due on the first mortgage and interest accrued. The mortgagor had filed a bill in equity to redeem just before the expiration of the three years. While the suit was pending the three years expired, but the mortgagor subsequently abandoned the suit. The second mortgagee by the assignment succeeded to all the rights of the first mortgagee, and held the land by an indefeasible title under a completed foreclosure.

[3] Capen *v.* Richardson, 7 Gray, 364.

[4] McNiel *v.* Call, 19 N. H. 403, 414.

[5] Deming *v.* Comings, 11 N. H. 474.

closed;[1] though if he should afterwards take an assignment of the mortgage, he would doubtless be concluded by this, and the foreclosure opened accordingly. The assignee of a mortgage assigned to him by the mortgagee as security for the payment of a debt of his may, after entering with the knowledge of the mortgagee to foreclose, waive and release this entry without the assent of the mortgagee. The assignee has full control of the remedies provided by law, and may enter into or relinquish possession at his discretion.[2]

If after entry the mortgagee be put under guardianship as a spendthrift, the guardian has authority to restore possession to the mortgagor, to hold as before the entry and to prevent a foreclosure.[3] Such restoring of possession will do away with the effect of the entry and prevent foreclosure.[4]

1268. An entry does not waive rights acquired under a previous purchase at a sale under a power. Where a mortgagee has indirectly become a purchaser at a sale made under a power contained in the mortgage, which gave him no right to purchase, and the sale is for this reason voidable, he may enter to foreclose, and record his certificate of entry without waiving or abandoning any rights acquired by the purchase. The entry in itself does not show such intention.[5]

1269. Receiving payment works a waiver. — An entry to foreclose as well as a foreclosure itself is of course waived by subsequently receiving payment of the mortgage debt;[6] or of any part of it;[7] or by receiving articles which the mortgagee had agreed in the condition of the mortgage to furnish in support of the mortgagee, who continued to reside with the mortgagor;[8] or by receiving interest as such on the mortgage debt.[9] But the mere fact that after the three years payments are made on account of the mortgage debt will not open the foreclosure. Such payments may have been made because the premises were not of sufficient value to satisfy the debt. The intention of the parties to waive the foreclosure should be shown by other evidence.[10] If

[1] Fisher *v.* Shaw, 42 Me. 32.
[2] Cutts *v.* York Manuf. Co. 14 Me. 326.
[3] Botham *v.* M'Intier, 19 Pick. 346.
[4] Ib.
[5] Learned *v.* Foster, 117 Mass. 365.
[6] Batchelder *v.* Robinson, 4 N. H. 40; Gould *v.* White, 26 N. H. 178; Green *v.* Cross, 45 N. H. 577.
[7] And see Winchester *v.* Ball, 54 Me. 558.
[8] Willard *v.* Henry, 2 N. H. 120.
[9] Trow *v.* Berry, 113 Mass. 139.
[10] Lawrence *v.* Fletcher, 10 Met. 344.

the mortgagee, after the expiration of three years from his entry, at the request of the mortgagor, conveys the premises to a third person by a deed reciting that it is made at the request of the mortgagor, and is intended to discharge all title acquired by the mortgagee, the grantee having paid the amount due on the mortgage, the grantee takes a title subject to redemption by the mortgagor.[1] But a quitclaim deed by a mortgagee after foreclosure to one of two mortgagors, in consideration of a sum equal to the original mortgage debt, is not sufficient evidence of an opening of the foreclosure to revest any title in the other mortgagor as a joint-owner.[2] After the foreclosure there was no privity between the mortgagors. The grantee had as good a right to purchase as a stranger. The fact that he paid a sum equal to that due on the mortgage at that time is no presumption that the transaction was a redemption for the benefit of both.

1270. If the payment be made and received under an express understanding that the foreclosure is to be opened, there can be no question that it is opened.[3] Facts and circumstances from which an express understanding may be clearly inferred avail equally.[4] But the acts of the parties will not have this effect when they are such as to leave their intention doubtful in this respect, or when they may be explained consistently with the right of the mortgagee to retain the estate under the foreclosure.[5]

After a mortgagee has entered under a judgment in an action to foreclose the mortgage, a release of the judgment does not of itself operate as a waiver in law of the foreclosure, which will be complete if he retains continued, actual possession during the time provided by statute for the purpose of foreclosing. His possession is, by virtue of his mortgage title, established by the judgment, and not under the process.[6]

1271. The entry is not waived by the mortgagee's rendering an account charging himself with rent for a period after the entry;[7] nor by his neglect or refusal to render an account to the

In **New Hampshire** the mere receipt of part of the money secured by the mortgage is held to waive the foreclosure. McNiel *v.* Call, 19 N. H. 403; Deming *v.* Comings, 11 N. H. 474; Moore *v.* Benson, 44 N. H. 215.

[1] Rangely *v.* Spring, 28 Me. 127.

[2] Crittenden *v.* Rogers, 8 Gray, 452.

[3] Dow *v.* Moor, 59 Me. 118.

[4] Stetson *v.* Everett, 59 Me. 376.

[5] Lawrence *v.* Fletcher, 8 Met. 153.

[6] Couch *v.* Stevens, 37 N. H. 169.

[7] Hobbs *v.* Fuller, 9 Gray, 98.

mortgagor at his request of the amount due on the mortgage.[1] If a mortgagee in his answer made in a suit in equity to redeem the mortgage expressly waives all objection to redemption, upon payment of all sums due upon it, he cannot afterwards claim that the mortgage had been foreclosed before the suit was commenced.[2]

1272. Conditional waiver. — A mortgagee does not waive a foreclosure which has already become absolute, or extend the time of redemption, by agreeing to allow the mortgagor to redeem the premises upon the payment before a certain date of an amount equal to what was due on the mortgage on that day, if the agreement be not fulfilled by payment or tender of the money within the time limited.[3] And so if a surety or other person in behalf of the mortgagor pays the conditional judgment, and takes an assignment of it either before or after the lapse of the three years from the time possession was taken, under an agreement with the mortgagor to assign it to him if he should pay the amount within a certain time, if the agreement be not kept there is no waiver of the foreclosure, which becomes perfect in the hands of the assignee.[4] And so also an agreement by the mortgagee to sell his foreclosure title to the mortgagor for the amount of the mortgage debt to be paid within a certain time is not sufficient to open the foreclosure.[5]

1273. The entry is not waived by the mortgagee's bringing a writ of entry against a tenant at will of the mortgagor, and obtaining judgment for possession, although in such a writ the demandant describes himself as out of possession, and the tenant as wrongfully withholding possession from him. This is only a technical and formal admission made for the purpose of enforcing a convenient remedy. It is no admission that the mortgagee is out of possession, or that he waives the benefit of his formal entry.[6] Even the bringing of a writ of entry against the owner of the equity of redemption for the purpose of foreclosure is not an abandonment of the possession previously taken;[7] but if a conditional judgment be entered and a writ of possession issue, under which the mortgagee is put in possession, this is a waiver of

[1] Sanborn *v.* Dennis, 9 Gray, 208.
[2] Strong *v.* Blanchard, 4 Allen, 538.
[3] Clark *v.* Crosby, 101 Mass. 184.
[4] Worthy *v.* Warner, 119 Mass. 550.
[5] Stetson *v.* Everett, 59 Me. 376.
[6] Fletcher *v.* Cary, 103 Mass. 475.
[7] Beavin *v.* Gove, 102 Mass. 298; Devens *v.* Bower, 6 Gray, 126; Mann *v.* Earle, 4 Gray, 299; Merriam *v.* Merriam, 6 Cush. 91; Fletcher *v.* Cary, 103 Mass. 475; Page *v.* Robinson, 10 Cush. 99; Dorrell *v.* Johnson, 17 Pick. 263.

a previous entry.[1] The bringing of an action of trespass for waste against the mortgagor is not an abandonment of a previous entry to foreclose.[2] A mortgagee after commencing a foreclosure by publication under the statutes of Maine may enter and take possession of the premises without waiving the proceedings to foreclose;[3] and if he is ousted of his possession after such entry he may maintain a writ of entry at common law, and obtain judgment for possession, without waiving the foreclosure commenced by publication.[4]

1274. A recovery of judgment for the mortgage debt or any part of it after foreclosure, on the ground that the value of the premises at the time of the foreclosure was less than the sum due, opens the foreclosure.[5] A recovery of judgment against the mortgagor for rent of the premises during the three years after entry operates, like a recovery of judgment for the debt, to open the foreclosure.[6]

After foreclosure is complete, a promise or agreement made by the mortgagee to receive the debt and release the land cannot be enforced unless made on a legal and sufficient consideration.[7]

1275. If by accident or mistake the time of redemption goes by, the person entitled to redeem must not delay in seeking relief. Ordinarily the foreclosure of a mortgage by entry and three years' possession is conclusive, both in law and equity, and will not be disturbed without good cause shown. Where a bill in equity to redeem was brought on the day before foreclosure would have become absolute, and by reason of being brought in the wrong county was dismissed, and there was no tender, or agreement to extend the time of redemption, the court refused to open the foreclosure on a new bill brought nearly a year after the dismissal of the former one.[8]

[1] Fay *v.* Valentine, 5 Pick. 418; Smith *v.* Kelley, 27 Me. 237; Tufts *v.* Maines, 51 Me. 393.

[2] Page *v.* Robinson, 10 Cush. 99.

[3] Concord U. Mut. Ins. Co. *v.* Woodbury, 45 Me. 453.

[4] Stewart *v.* Davis, 63 Me. 539.

[5] Massachusetts Gen. Stat. 1860, c. 140, § 33. Suit to redeem must be brought within one year after the recovery of the judgment.

[6] Morse *v.* Merritt, 110 Mass. 458.

[7] Smalley *v.* Hicok, 12 Vt. 153.

[8] Webb *v.* Nightingale, 14 Allen, 374.

CHAPTER XXIX.

FORECLOSURE BY WRIT OF ENTRY.

I. Nature of and where used, 1276–1279.
II. Who may maintain, 1280–1289.
III. Against whom the action may be brought, 1290, 1291.
IV. The pleadings and evidence, 1292–1295.
V. The defences, 1296–1305.
VI. The conditional judgment, 1306–1316

9. *Nature of and where used.*

1276. **The process of foreclosure by a writ of entry as used in Massachusetts and Maine,** although in form a suit at law, is in effect a bill in equity. When used for this purpose the technical rules applicable to this action at common law are not in all respects followed. A judgment does not necessarily give possession; it provides for this only upon the default of the owner of the equity of redemption to perform the condition of the mortgage within a specified time. The amount due on the mortgage for which conditional judgment is entered is ascertained according to equity and good conscience, and by the same rules as this amount is determined in a bill in chancery to redeem the same mortgage; insomuch that such conditional judgment is conclusive evidence, on the hearing of a subsequent bill to redeem the same mortgage, of the amount due on it.[1]

This process is used only in those states in which foreclosure is effected by entry *in pais* and possession.

1277. **In Massachusetts** [2] **and Maine,**[3] instead of possession

[1] Holbrook *v.* Bliss, 9 Allen, 69; Fletcher *v.* Cary, 103 Mass. 475, 479; Palmer *v.* Fowley, 5 Gray, 545; Sparhawk *v.* Wills, 5 Gray, 427; Walcutt *v.* Spencer, 14 Mass. 409; Amidown *v.* Peck, 11 Met. 467; Peck *v.* Hapgood, 10 Met. 173; Doten *v.* Hair, 16 Gray, 149.

[2] G. S. c. 140, §§ 1–11.

In **Massachusetts,** by the Prov. Stat. of 10 W. 3, c. 14, entitled "An act for hearing and determining of cases in equity," the courts, in all cases of "forfeiture of estates on condition, executed by deed of mortgage, or bargain and sale,

[3] Rev. Stat. 1871, c. 90, §§ 7, 8, 10, 12; Laws, 1872, c. 18.

obtained by entry, the mortgagee may recover possession by writ of entry, declaring on his own seisin, stating that it is in mortgage, and if it appears that he is entitled to possession for breach of the condition, the court on motion of either party awards a conditional judgment, if the defendant be the mortgagor or any one claiming under him, that if he within two months after the judgment pays to the plaintiff the sum found due on the mortgage with interest and costs the mortgage shall be void; otherwise that the plaintiff shall have his execution for possession. If but part of the mortgage money is due, or the condition of the mortgage be for the doing of any other thing, the terms of the judgment are varied as the case may require.[1]

The action may be brought by an assignee of the mortgagee, and after his death by his executor or administrator. It may be brought against whoever is tenant of the freehold, and the mortgagor may in all cases be joined as a defendant whether he then has any estate in the premises or not; but he is not liable for costs when he has no estate, and makes no defence to the suit. Possession obtained in this way must be continued for three years to foreclose the right of redemption.

1278. In New Hampshire, also, possession may be obtained by a writ of entry; and when so obtained no notice by publication, as in the case of an entry *in pais*, is necessary. Actual possession continued one year completes the foreclosure.[2] The process should be against the party in possession claiming title.[3] The judgment is conditional, that if the mortgagor shall pay the sum found due within two months after judgment rendered, with interest, the judgment shall be void, otherwise a writ of possession shall issue.[4]

with defeasance," were empowered "to moderate the rigor of the law, and on consideration of such cases according to equity and good conscience, to chancer the forfeiture, and enter up judgment for the just debt and damages, and to award execution accordingly; only in real actions upon mortgage, or bargain and sale, with defeasance, the judgment to be conditional that the mortgagor or vendor, or his heirs, executors, or administrators, do pay unto the plaintiff such sum as the court shall determine to be justly due thereupon, within two months' time after judgment entered up for discharging of such mortgage or sale; or that the plaintiff recover possession of the estate sued for, and execution be awarded for the same." Prov. Stat. (ed. 1726) 109. This was reënacted in 1785. St. 1785, c. 22, § 1.

[1] See Stewart *v.* Clark, 11 Met. 389; Holbrook *v.* Bliss, 9 Allen, 69, 73.

[2] G. L. 1878, c. 136, § 14.

[3] Green *v.* Cross, 45 N. H. 578.

[4] G. S. c. 112, § 14; c. 213, § 12; G. L. 1878, c. 232, § 12.

1279. In Rhode Island, instead of a writ of entry for obtaining possession of the mortgaged premises, an action of ejectment, or of trespass and ejectment, is used for the purpose. In such action, where a right of redemption is shown, the court ascertains the sum due on the mortgage, and renders a conditional judgment, that if the mortgagor, his heirs, executors, administrators, and assigns shall pay to the plaintiff, or deposit in the clerk's office for him, the sum adjudged due, within two months from the entry of the judgment, with interest, then the mortgage shall be void, otherwise that the plaintiff shall have his writ of possession.[1]

2. *Who may maintain.*

1280. A legal interest in the realty is essential to sustain a writ of entry to foreclose a mortgage. The action must therefore be brought by the mortgagee, or his assignee, or by the personal representatives of the holder of the mortgage, upon his decease. The plaintiff must hold the legal estate at the time he brings the action, and it is immaterial that he holds the title for the benefit of another; a *cestui que trust* cannot maintain the action.[2] If the plaintiff be the assignee of the mortgage, he must show a formal assignment of the mortgage to himself. An equitable assignment merely is not sufficient. Therefore, one who holds a mortgage note by indorsement alone, without an assignment of the mortgage, cannot maintain the action in his own name. He has at most only a resulting trust in the mortgage title.[3] The mortgagee after such indorsement, although holding only a barren fee without beneficial interest, is presumed in the absence of any agreement, or anything to indicate the intention of the parties, to hold such title in trust for the indorsee, to whom it would be of value;[4] and the mortgagee might maintain a writ of entry to foreclose for the benefit of such assignee at his request. In some states the mere transfer of the note is held to carry with it the mortgage security, and the right to enforce that; but the remedy in those states is an equitable one and not by writ of entry.

1281. After assignment. — Although a mortgagee who has formally assigned his mortgage cannot proceed to foreclose it, and

[1] Gen. Stat. 1872, c. 205, § 7.

[2] Somes *v.* Skinner, 16 Mass. 348; Young *v.* Miller, 6 Gray, 152, 154.

[3] Johnson *v.* Brown, 31 N. H. 405; Young *v.* Miller, *supra*.

[4] Johnson *v.* Brown, *supra*.

a judgment obtained by him would be nugatory,[1] yet if the assignee reindorse and redeliver the mortgage with the assignment cancelled, it never having been recorded, he may still maintain the action.[2] By the cancellation of the assignment it is rendered useless and ineffectual to the assignee, and the mortgage remains in full force and effect in the mortgagee, who alone has any interest in it, or any right to enforce it.

1282. A mortgagee who has made an assignment absolute in form, but really intended as security for a debt, may nevertheless maintain an action to foreclose the mortgage, where the nature of the transaction is shown by an acknowledgment by the assignee that he has "received full satisfaction for the debt secured by the above assignment." This acknowledgment relates back to the time of the making of the assignment, and is conclusive evidence of an agreement then made by the assignee to reassign. The acknowledgment is a defeasance of the assignment, and the whole transaction a mortgage of a mortgage.[3]

The mortgagee who holds the legal title under the mortgage may maintain the writ in his own name alone, although the security is partly for the benefit of other persons mentioned in the deed; as where a father conveys his homestead to his son, and takes a mortgage back in his own name, to secure the maintenance of himself and wife, and also the payment to other children of certain sums as their portion of their father's estate. He may maintain the action although the object of it be wholly to enforce the payment of the sums due to his children.[4]

A mortgagee who has assigned his mortgage and note as collateral security for a debt of his own, and upon paying this has received a reassignment of the mortgage, may maintain a writ of entry to foreclose it, although the note was lost while in the hands of the assignee.[5] It does not matter that the assignee of the mortgage also purchases the equity of redemption on execution against the mortgagor; as the mortgage does not merge, and the mortgagee has a remaining right, he may recover possession of the land by writ of entry, without making actual entry.[6]

[1] Call *v.* Leisner, 23 Me. 25; Gould *v.* Newman, 6 Mass. 239.

[2] Howe *v.* Wilder, 11 Gray, 267.

[3] Coffin *v.* Loring, 9 Allen, 154. But it would seem that the nature of the transaction in such case could not be shown by parol. Lincoln *v.* Parsons, 1 Allen, 388.

[4] Northy *v.* Northy, 45 N. H. 141.

[5] Ward *v.* Gunn, 12 Allen, 81.

[6] Tuttle *v.* Brown, 14 Pick. 514.

A deed by the mortgagee, whether a warranty or quitclaim, passes his title in the same way that an assignment would, and although the notes secured by the mortgage are not transferred at the same time, the grantee may maintain a writ of entry to foreclose the mortgage, and on producing the notes may have a conditional judgment.[1]

If the mortgage be assigned while a writ of entry is pending, the assignee may, by virtue of his assignment, prosecute the suit in the name of the mortgagee for his own benefit to final judgment, and enter under the writ of possession when it is issued in the same manner as the mortgagee might have done.[2]

An assignee may bring his action for possession, although the assignment to him has not been recorded at the time; but it would seem that before trial of the action it must be recorded,[3] in order to authorize its introduction in evidence.

1283. One of two or more joint mortgagees or assignees of a mortgage cannot alone maintain a writ of entry to foreclose the mortgage. All the persons having a legal interest in the mortgage must join in enforcing it.[4] If it be held by them in trust, the abandonment of the trust by one of them does not vest the title in the others, without deed or legal process; though on the death of one, the survivors succeed to the rights and remedies to which all of them were before jointly entitled.[5] If, however, a mortgage be given to secure separate debts or obligations, each mortgagee is entitled to enforce his rights in his own name; as, for instance, a mortgage given for the support of a father and mother "each and severally," may be enforced by the father alone.[6] When a mortgage is given to secure several debts, the obvious purpose is to give to each security for his particular debt. If the mortgagees hold separate notes secured by the same mortgage, each has a right to enforce his claim under the mortgage, and there is of course no right of survivorship.[7] In New Hampshire it is held that the action must be brought in the names of all the holders of the several notes.[8]

[1] Ruggles *v.* Barton, 13 Gray, 506.

[2] § 808; Hurd *v.* Coleman, 42 Me. 182.

[3] Wolcott *v.* Winchester, 15 Gray, 461, 466.

[4] Webster *v.* Vandeventer, 6 Gray, 428. See Dewey *v.* Brown, 2 Pick. 388; Aiken *v.* Gale, 37 N. H. 501.

[5] Blake *v.* Sanborn, 8 Gray, 154; Burnett *v.* Pratt, 22 Pick. 556.

[6] Gilson *v.* Gilson, 2 Allen, 115.

[7] Burnett *v.* Pratt, 22 Pick. 556.

[8] Noyes *v.* Barnet, 57 N. H. 605; Johnson *v.* Brown, 31 N. H. 405; Page *v.* Pierce, 26 N. H. 317

If a mortgage be made to an unincorporated association, or to a firm by a corporate or firm name, a writ of entry to foreclose it must be brought in the names of the individuals who compose the firm or do business under such general name.[1]

1284. Two mortgages of the same land made by the same mortgagor and held by the same assignee, though given at different times to different persons, may be embraced in one suit of foreclosure, and a conditional judgment for the amount of both debts may be entered.[2] The judgment should properly specify the amount due on each mortgage as well as the aggregate amount due, so that the rights of any intervening third party might be determined. If the two mortgages embraced distinct parcels of land, or the debts were due from different persons, they cannot be united in one suit and consolidated in one judgment.[3]

1285. A second mortgagee may maintain an action to foreclose his mortgage against the owner of the equity of redemption, although such owner also holds the first mortgage. The judgment in such case would be valid and effectual to foreclose the second mortgage as against all titles subsequent to it, but qualified as to disturbing the possession under the prior mortgage. The first mortgagee has the right to hold the estate under his mortgage for the purpose of foreclosure as against the second mortgagee; but the second mortgagee has the right to such possession as will enable him to foreclose as against the right to redeem his second mortgage. The foreclosure of both mortgages may go on at the same time: the first mortgagee having such possession as will operate to foreclose against the right of the second mortgagee to redeem; and the second mortgagee having such constructive possession as will operate to foreclose against the right to redeem the estate from his mortgage. The possession of each operates according to his rights.[4]

In such case it is, of course, immaterial that the owner of the equity of redemption, besides holding the first mortgage, holds a third mortgage or any other interest in the property. Under the execution the second mortgagee may be put temporarily in pos-

[1] Pomeroy *v.* Latting, 2 Allen, 221. The mortgage in this case was to "The Copake Iron Works," a partnership.

[2] Pierce *v.* Balkam, 2 Cush. 374. See, also, Grant *v.* Galway, 122 Mass. 135.

[3] Peck *v.* Hapgood, 10 Met. 172.

[4] Kilborn *v.* Robbins, 8 Allen, 466; Cronin *v.* Hazletine, 3 Allen, 324; Doten *v.* Hair, 16 Gray, 149. See Palmer *v.* Fowley, 5 Gray, 545.

session without an actual ouster of the first mortgagee, and such possession will foreclose all titles subsequent to the second mortgage.[1] It is all the same whether the first mortgagee be in possession under an entry *in pais*, or by virtue of a writ of possession issued under a conditional judgment for foreclosure.[2]

A mortgagee of a remainder or reversion may in like manner maintain such action during the lifetime of the tenant of the particular estate.[3] In such case the tenant cannot be dispossessed, but the officer may under the execution deliver possession as against the mortgagor, so as to divest him of all his legal title in the land. One joint-owner of the equity of redemption, on receiving an assignment of the mortgage, may maintain a writ of entry and recover a conditional judgment against the other.[4]

1286. Homestead right. This action may be maintained and judgment may be rendered thereon and formal possession taken, although there be an outstanding estate of homestead. The entry thus made is sufficient to bar the right in equity to redeem the reversionary estate after the expiration of three years, though subject to the full enjoyment of the homestead estate.[5]

If the homestead right has been released in the mortgage, it is no defence to the writ of entry to foreclose the mortgage that the estate is sufficient to satisfy the mortgage, without having recourse to the homestead.[6] "The power of a court of chancery to compel a mortgagee to resort in the first instance to one of several estates mortgaged is exercised only for protection of the equities of different creditors or incumbrancers, or of sureties, and not for the benefit of the mortgagor. As against him, the mortgagee has the right to enforce the contract between them according to its terms, and is not obliged to elect between different remedies or securities. The right of homestead, created by our statutes, is certainly entitled to no higher degree of favor than the courts have always accorded to the common law right of dower. The case cannot be distinguished in principle from the ordinary one in which a wife, who has joined by way of releasing dower in the mortgage of her husband, is held to pay the whole mortgage debt

[1] Cronin *v.* Hazletine, 3 Allen, 324; George *v.* Baker, 3 Allen, 326.

[2] Amidown *v.* Peck, 11 Met. 469; Walcutt *v.* Spencer, 14 Mass. 409.

[3] Penniman *v.* Hollis, 13 Mass. 429.

[4] Aiken *v.* Gale, 37 N. H. 501.

[5] Doyle *v.* Coburn, 6 Allen, 71.

[6] Searle *v.* Chapman, 121 Mass. 17. See §§ 731, 1632.

as a condition of asserting her right of dower against the mortgagee." [1]

1287. Prior entry to foreclose no objection. — A mortgagee who has entered to foreclose in the presence of witnesses, and still remains in possession, may nevertheless maintain a writ of entry against the mortgagor to foreclose the mortgage; [2] and such previous possession is not waived or abandoned by the commencement of the action; [3] though it is upon delivery of possession to the mortgagee upon an execution issued on the judgment obtained in such action.[4]

The fact that a mortgage contains a power of sale is no objection to a foreclosure by writ of entry. The power of sale is merely a cumulative remedy which does not interfere with a foreclosure by action, or by entry and possession.[5]

1288. If the holder of the mortgage die before entry for condition broken, the mortgage, being personal assets, goes to his executor or administrator, who alone can maintain an action upon it. His heirs have no such interest as will give them any right of possession.[6]

1289. When right of action accrues. — Unless it is expressly stipulated that the mortgagor may remain in possession, or the necessary implication from the deed is that he may do so, the mortgagee may at once, before breach of the condition, and without previous notice of the suit, maintain a writ of entry for the possession.[7] The provisions or conditions in the mortgage deed may be such that they will necessarily imply a covenant that the mortgagor may occupy so long as he fulfils these conditions, and they may thus constitute a good bar to a writ of entry at common law to obtain possession; [8] thus, where the mortgage recited that the mortgagee had conveyed the premises to the mortgagor "for the future maintenance and support" of the former, and that the mortgagor had "at the same time reconveyed the same to the

[1] Per Gray, C. J., in Searle *v.* Chapman, 121 Mass. 17.

[2] Beavin *v.* Gove, 102 Mass. 298; Merriam *v.* Merriam, 6 Cush. 91; Devens *v.* Bower, 6 Gray, 126; Page *v.* Robinson, 10 Cush. 99; Mann *v.* Earle, 4 Gray, 299, 300; Gen. Stat. of Mass. c. 140, §§ 1, 11.

[3] Page *v.* Robinson, *supra.*

[4] Fletcher *v.* Cary, 103 Mass. 475.

[5] Furbish *v.* Sears, 2 Cliff. 454.

[6] Smith *v.* Dyer, 16 Mass. 18; Dewey *v.* Van Deusen, 4 Pick. 19; Shelton *v.* Atkins, 22 Pick. 71. See Gen. Stat. of Mass. c. 96, § 9; c. 140, § 7.

[7] See § **702**; Hobart *v.* Sanborn, 13 N. H. 226; Dearborn *v.* Dearborn, 9 N. H. 117; Lackey *v.* Holbrook, 11 Met. 458; Newall *v.* Wright, 3 Mass. 138, 155.

[8] Bean *v.* Mayo, 5 Me. (5 Greenl.) 89.

mortgagee as security for such maintenance and support," the condition being that the mortgagor should support the mortgagee, it was held to be a necessary implication from these recitals that the mortgagor should retain possession so long as he performed the acts, the performance of which the mortgage was given to secure.[1] In the absence, however, of anything in the mortgage to show that the mortgagor is entitled to possession, it cannot be shown by parol evidence that it was agreed by the parties that the mortgagor should retain possession.[2]

3. *Against whom the Action may be brought.*

1290. The tenant of the freehold is a necessary party defendant.[3] Action cannot be maintained against a tenant at will or for years, if he is willing to give up possession of the premises.[4] If, however, such tenant refuses to yield possession when it is demanded of him, he may be regarded as a disseisor, and, as against the mortgagee, the tenant of the freehold.[5] On this ground the action may be maintained against a purchaser of the equity of redemption after he has conveyed it away again, but still retains possession and refuses to yield it on demand; but the judgment will be for possession in the ordinary form, and not a conditional judgment.[6]

The fact that the mortgagors were blind, and their father lived with them, and was the only manager and efficient agent on the premises, which he cultivated and improved, does not make him a tenant of the land or liable to the action.[7]

1291. A wife who has signed the mortgage merely in release of dower need not be joined in the suit;[8] but if the husband and wife mortgage her real estate and continue in possession till condition broken, they are rightly sued together.[9] A widow to whom dower has been assigned in the mortgaged premises, though wrongfully, is a tenant of the freehold if in possession.[10]

[1] Wales *v.* Mellen, 1 Gray, 512. See § 668.

[2] Colman *v.* Packard, 16 Mass. 39.

[3] Gen. Stat. of Mass. c. 140, § 8; Rev. Stat. of Me. 1871, c. 90, § 12.

[4] Wheelwright *v.* Freeman, 12 Met. 154; Raynham *v.* Snow, 12 Met. 157. Under the early laws of Massachusetts it could be maintained against a tenant at will. Keith *v.* Swan, 11 Mass. 216.

[5] Johnson *v.* Phillips, 13 Gray, 198; Wheelwright *v.* Freeman, 12 Met. 154, 156; Keith *v.* Swan, 11 Mass. 216; Hunt *v.* Hunt, 17 Pick. 118, 121.

[6] Johnson *v.* Phillips, *supra.*

[7] Churchill *v.* Loring, 19 Pick. 465.

[8] Pitts *v.* Aldrich, 11 Allen, 39.

[9] Swan *v.* Wiswall, 15 Pick. 126.

[10] Raynham *v.* Wilmarth, 13 Met. 414.

The action cannot be maintained against the mortgagor alone after he has conveyed the estate to a third person, and the latter has conveyed it to the mortgagor's wife to her sole and separate use, although he has continued to occupy the premises with his wife. She is the tenant of the freehold and a necessary party to the action. The mortgagor's possession must be deemed to be permissive only, and subject to and in the right and interest of his wife as owner of the fee.[1] But if a third person be in actual possession under a lease for a term of years by a title paramount to that of the mortgage, the action may be maintained against the owner of the equity of redemption.[2]

1292. The mortgagor may always be joined as a defendant, although he has parted with all interest in the premises before the action is brought. If he conveys his equity of redemption after suit is commenced against him as the tenant in possession, this does not defeat the action, but it may proceed to judgment just the same.[3] All persons coming in under him after the suit is commenced are bound by the judgment and by the possession taken under it. Were it otherwise the suit might be wholly defeated by successive alienations;[4] and it seems that those who have acquired title under the mortgagor, after the giving of the mortgage and before the commencement of the action, are equally bound by the action, though not joined as defendants, if the execution and the proceedings upon it are duly recorded.[5]

An action may be maintained against a mortgagor to foreclose a mortgage not acknowledged or recorded, for it conveys the property as between the parties.[6]

If the mortgagor has conveyed the land in separate parcels to different persons, a writ of entry must be brought against each tenant holding in severalty. A judgment against one of them for the whole tract does not foreclose the rights of the others.[7]

[1] Campbell *v.* Bemis, 16 Gray, 485.

[2] Whittier *v.* Dow, 14 Me. 298.

[3] Straw *v.* Greene, 14 Allen, 206; Hunt *v.* Hunt, 17 Pick. 118; Wheelwright *v.* Freeman, 12 Met. 154.

[4] Hunt *v.* Hunt, *supra*.

[5] Hunt *v.* Hunt, *supra;* Robbins *v.* Rice, 7 Gray, 202; Gen. Stat. of Mass. c. 133, § 55.

[6] Howard Mut. Loan & Fund Association *v.* McIntyre, 3 Allen, 571.

[7] Varnum *v.* Abbot, 12 Mass. 474; Fosdick *v.* Gooding, 1 Me. 30, 50; Carll *v.* Butman, 7 Me. 102. According to a former practice the several tenants were joined as defendants. 4 Dane Abr. 192. This practice was corrected by Chief Justice Parsons, in Varnum *v.* Abbot, *supra;* and see Taylor *v.* Porter, 7 Mass. 355.

4. *The Pleadings and Evidence.*

No attempt is made to give any statement of the pleadings and evidence applicable to this form of action; recourse must be had to the general rules on these matters, and to the practice of the states where this form of foreclosure is used. A few points only will be noticed.

1293. The declaration should allege the seisin to be "in mortgage."[1] It should show that a foreclosure is desired, rather than possession for the purpose of taking the profits.[2] A judgment for possession at common law is entered unless a conditional judgment is asked for by one of the parties; and if the defendant be a stranger, or one not claiming under the mortgagor, the judgment will not be conditional except with the consent of the plaintiff.

1294. Answer. — Any specific matter of defence should be set up by answer. Under the general issue the defendant is not allowed to show that he was not in possession of the premises; or that they are subject to a mortgage previous or paramount to that held by the demandant; or that they are in possession of a third party, who has obtained a judgment for foreclosure upon that mortgage.[3]

1295. Evidence. — The demandant makes out a *primâ facie* case by proving the execution, delivery, acknowledgment, and recording of a mortgage made by a third person.[4] If the demandant holds the mortgage as assignee, he must also prove the execution and delivery of the assignment to himself, although this be not denied in the plea.[5] It is not necessary to show that the mortgagor owned the land; he cannot dispute the mortgagee's title. On the production of a note signed by a husband and wife, with a mortgage to secure it assented to by the husband, it is not necessary to show that she owned the land in her own right.[6]

[1] Gen. Stat. of Mass. c. 129, § 3; c. 140, § 3. See Jackson on Real Actions, with Precedents.

[2] Fiedler *v.* Carpenter, 2 Wood. & M. 211; York Manuf. Co. *v.* Cutts, 18 Me. 204; Grant *v.* Galway, 122 Mass. 135. See, also, as to pleas by the defendant, Olney *v.* Adams, 7 Pick. 31; Wheelwright *v.* Freeman, 12 Met. 154; Richmond Iron Works *v.* Woodruff, 8 Gray, 447; Webster *v.* Vandeventer, 6 Gray, 428; Rochester *v.* Whitehouse, 15 N. H. 468; Little *v.* Riley, 43 N. H. 109.

[3] Amidown *v.* Peck, 11 Met. 467; Devens *v.* Bower, 6 Gray, 126.

[4] Burridge *v.* Fogg, 8 Cush. 183.

[5] Warner *v.* Brooks, 14 Gray, 109.

[6] American Mut. Life Ins. Co. *v.* Owen, 15 Gray, 491.

The note or bond secured by the mortgage should be produced, although only incidentally in question. If lost, the contents may be proved, for the purpose of showing the amount for which conditional judgment shall be entered.[1] If the bond offered in evidence does not correspond to that described in the mortgage in amount or date, the variance may be explained by parol evidence.[2] A breach of the condition must of course be shown.

5. *The Defences.*

1296. Equitable defences allowed. — As already noticed, a writ of entry, as used in Massachusetts and Maine, for the foreclosure of a mortgage, is in effect a suit in equity rather than a real action at law, inasmuch as the plaintiff is entitled only to a conditional judgment.[3] As regards the defences that may be taken from the nature of the proceedings, these may be equitable as well as legal, unless the defendant sets up some title other than that of mortgagor. In that case his claim of prior independent title is tried and decided as in the ordinary action by this writ. Otherwise the suit, so far as regards the amount of the judgment and the conditional form of it, very much resembles a bill in equity when used for the same purpose. "The principal difference between the process in this point of view and the proceedings for the like purpose in the English courts is, that here our statute fixes the time within which the defendant shall pay the sum found due on the mortgage, in order to prevent the foreclosure, instead of leaving it to be limited in such cases by the courts."[4] The amount for which the conditional judgment shall be entered "is to be ascertained according to equity and good conscience, and by the same rules as on a bill in chancery to redeem the same mortgage."[5] Such judgment, in fact, is conclusive evidence of the amount due on a subsequent bill to redeem the same mortgage.[6]

[1] Ward *v.* Gunn, 12 Allen, 81; Grimes *v.* Kimball, 3 Allen, 518; Andrews *v.* Hooper, 13 Mass. 472, 475.

[2] Baxter *v.* McIntire, 13 Gray, 168. See Edgell *v.* Stanfords, 3 Vt. 202.

[3] See *supra*, § 1276. In Holbrook *v.* Bliss, 9 Allen, 69, the history of the law in this respect is given in a learned opinion by Judge Gray.

[4] Per Jackson, J., in Walcutt *v.* Spencer, 14 Mass. 411; Jackson on Real Actions, 49; Davis *v.* Thompson, 118 Mass. 497.

[5] Per Gray, J., in Holbrook *v.* Bliss, *supra*. See, also, Freeland *v.* Freeland, 102 Mass. 475.

[6] Sparhawk *v.* Wills, 5 Gray, 427.

In general the same defences may be made to an action to foreclose a mortgage that may be made in an action upon the note or other evidence of debt secured by the mortgage, excepting only the defence of the statute of limitations;[1] for, as already seen, the remedy on the mortgage remains good after an action on the debt is barred.[2]

1297. Want of consideration is of course a good defence; for in such case there is nothing on which to found a conditional judgment,[3] and parol evidence is admissible to show that no debt ever existed between the parties to the mortgage.[4] The fact that such a mortgage was given for the purpose of defrauding the mortgagor's creditors does not prevent his taking advantage of the want of consideration. As regards such fraudulent purpose the mortgagee is in no better condition than the mortgagor, as he must have participated in it.[5] So the fact that the note and mortgage were originally obtained by duress and fraud may be shown; or that the consideration was illegal.[6] A *bonâ fide* assignee of the note and mortgage before maturity might in such cases, on the general principles applicable to negotiable paper, recover when the original mortgagee or an assignee after default could not.[7]

1298. Payment of the mortgage debt, although not made till after breach of the condition, is of course a defence to a writ of entry to foreclose the mortgage. The receipt of payment is a waiver of the breach of condition. The mere legal estate is not sufficient to support the action, because after the debt is paid there can be no conditional judgment.[8] But the fact that no money is due upon the mortgage constitutes no defence, if the

[1] Vinton *v.* King, 4 Allen, 562; Brolley *v.* Lapham, 13 Gray, 294, 297; Davis *v.* Bean, 114 Mass. 360; Hannan *v.* Hannan, 123 Mass. 441. See § **610**.

[2] See §§ **1204**, **1205**; Thayer *v.* Mann, 19 Pick. 535.

[3] Wearse *v.* Peirce, 24 Pick. 141; Freeland *v.* Freeland, 102 Mass. 475; Hannan *v.* Hannan, 123 Mass. 441. See § **612**.

[4] Hannan *v.* Hannan, 123 Mass. 441.

[5] Wearse *v.* Peirce, *supra*. See § **619**.

[6] Vinton *v.* King, *supra*. See §§ **624**, **626**.

[7] Clark *v.* Pease, 41 N. H. 414. See § **834**.

[8] Vose *v.* Handy, 2 Me. 322; Slayton *v.* McIntyre, 11 Gray, 271; Burke *v.* Miller, 4 Gray, 116; Wearse *v.* Peirce, 24 Pick. 144; Wade *v.* Howard, 11 Pick. 297; and see Chadbourne *v.* Rackliff, 30 Me. 354. "When the debt is paid, the whole substantial purpose is accomplished; a mere naked seisin, without any beneficial interest, remains in the mortgagee; the legal seisin which he holds results from the application of a strict technical rule of law, and any technical answer to a claim thus formed is good." The case of Parsons *v.* Welles, 17 Mass. 418, so far as it asserts that a writ of entry may be maintained on the mortgagee's bare legal title, is overruled.

condition be to do any other act, such as to provide support, and this has not been performed.[1] After payment the writ cannot be maintained even against a third person, and at the request of the mortgagor by whom the payment has been made.[2] The debt is not discharged by a tender, made after condition broken and before the action was brought; it is only in equity that the mortgagor can avail himself of it. Therefore a tender after condition broken, if it be not accepted, constitutes no good defence to the action.[3]

It does not concern the defendant whether the plaintiff is prosecuting the foreclosure suit for his own benefit or for the benefit of another, unless in the latter case payment in whole or in part has been made to the person equitably interested; for such payment would be a defence. Otherwise the plaintiff, though not beneficially interested, is entitled to recover on his legal title.[4]

The mortgage is not extinguished by an assignment of it to an attaching creditor of the mortgagor to hold instead of the attachment, though the mortgagor procures the assignment by paying the mortgagee a sum equal to the amount due on the mortgage; and though for a temporary purpose it is reassigned to the mortgagee and afterwards assigned back again by him, it may still be enforced.[5]

1299. Surrender obtained by fraud. — If the mortgage has not in fact been paid or discharged, but delivered up to the mortgagor together with the note which it was given to secure, the action may still be maintained on proof that the delivery of these securities was obtained through the fraud of the mortgagor, in falsely representing that another note and mortgage which he gave the mortgagee in exchange were good and sufficient, when in fact they were worthless.[6] In such case the action may be maintained not only against the mortgagor, but also against one who has purchased from him in ignorance of this transaction between him and the mortgagee, and has paid the purchase money partly to the mortgagor and partly by taking up a subsequent mortgage; because the mortgage remaining undischarged of record, the pur-

[1] Mason *v.* Mason, 67 Me. 546.

[2] Prescott *v.* Ellingwood, 23 Me. 345; and see Bailey *v.* Metcalf, 6 N. H. 157.

[3] See §§ 886–892; Maynard *v.* Hunt, 5 Pick. 240; Stanley *v.* Kempton, 59 Me. 472.

[4] Sanderson *v.* Edwards, 111 Mass. 335.

[5] Sheddy *v.* Geran, 113 Mass. 378.

[6] Grimes *v.* Kimball, 3 Allen, 518.

chaser had constructive notice that it was still in force as an existing incumbrance, and having such notice he cannot insist that in equity his claim shall prevail over the legal title of the mortgagee.[1]

1300. Usury may be relied upon in defence to the foreclosure suit, in the same manner and to the same extent as in a suit upon the mortgage note.[2] But it must be pleaded and cannot be set up under the general issue.[3] The mortgagee will, however, be entitled to a conditional judgment unless the legal penalties for the usury exceed the whole debt.[4] The penalties go to reduce the amount for which the conditional judgment will be rendered. If there be no usury in the original transaction, a payment subsequently made to the mortgagee of a sum over and above the interest due on the debt, in consideration of his forbearance for a time to enter upon the premises and foreclose the mortgage, is not usurious, and is not deducted from the amount of the debt in ascertaining the amount of the conditional judgment.[5]

1301. Right of action not accrued. — The mortgagor may show in defence to the action that no breach of the condition has occurred.[6]

1302. A defence may be maintained as to a part of the premises, by showing a valid release of the mortgage as to such part, though as to the remainder of the premises there be no defence.[7]

1303. A purchaser subject to a mortgage cannot set up fraud in obtaining the mortgage. If he holds the premises by a quitclaim deed from the mortgagor, he cannot defend an action to foreclose the mortgage by showing that the mortgagee obtained the mortgage by false and fraudulent representations to the mortgagor; nor can he for this reason claim a reduction of the amount for which the conditional judgment is to be entered. If any such claim exists it must be made by the mortgagor, as it does not pass to a purchaser from him by quitclaim deed.[8]

1304. Promise not to enforce. — It is no defence to an action to foreclose a mortgage that the mortgagee has verbally promised

[1] Grimes *v.* Kimball, 8 Allen, 153.

[2] Hart *v.* Goldsmith, 1 Allen, 145, 147; Minot *v.* Sawyer, 8 Allen, 78. See § **633**.

[3] Little *v.* Riley, 43 N. H. 109; Briggs *v.* Sholes, 14 N. H. 262.

[4] Manahan *v.* Varnum, 11 Gray, 405.

[5] Drury *v.* Morse, 3 Allen, 445.

[6] Pettee *v.* Case, 11 Gray, 478.

[7] Wolcott *v.* Winchester, 15 Gray, 461.

[8] §§ **744**, **1807**; Fairfield *v.* McArthur, 15 Gray, 526; Foster *v.* Wightman, 123 Mass. 100.

the owner of the equity of redemption that he should hold the land discharged of the mortgage ;[1] and a court of equity will not restrain the prosecution of it. A legal instrument under seal cannot be set aside by such a verbal agreement.[2] Moreover after a suit to foreclose a mortgage has been instituted, the prosecution of it will not be enjoined, although the holder of the equity of redemption offers to pay any sum that may be due under the mortgage, for that may just as well be determined in the foreclosure suit.[3]

1305. The defendant is not allowed to set up any title acquired by him after the commencement of the action; as for instance the tenant cannot defeat an action by the holder of a second mortgage by obtaining an assignment of the first mortgage to himself, and offering by means of this to show a superior title.[4] But the defendant may set up a superior title acquired before the commencement of the action, and the title may be tried as in a common law writ of entry; and if such title is older and better than the mortgage title, he will prevail in the suit. If instead of acquiring such outstanding title, a stranger holding it, pending the suit, ousts him or recovers the land against him, the writ will abate if the facts are specially pleaded.[5]

6. *The Conditional Judgment.*

1306. The judgment after determining the amount due on the mortgage is conditioned that if the defendant shall pay to the plaintiff the sum so adjudged to be due, with interest thereon, within two months from the time of entering it, then the mortgage shall be void and discharged; otherwise the plaintiff shall have his execution for possession. Possession gained in this way has the same effect as an entry *in pais* in the manner already described, and if continued for three years the right of redemption at the end of that period is forever foreclosed. In such case the time limited begins to run from the date when the officer delivers seisin and possession upon the execution. The officer's return on the execution is not conclusive as to the actual date of the deliv-

[1] Maynard *v.* Hunt, 5 Pick. 240; and see Brolley *v.* Lapham, 13 Gray, 294.

[2] Hunt *v.* Maynard, 6 Pick. 489.

[3] Kilborn *v.* Robbins, 8 Allen, 466.

[4] Hall *v.* Bell, 6 Met. 431; Nash *v.* Spofford, 10 Met. 192; and see Den *v.* Vanness, 10 N. J. L. (5 Halst.) 102. Per Jackson, J., in Walcutt *v.* Spencer, 14 Mass. 409, 411.

[5] Walcutt *v.* Spenser, *supra*. See, however, Dorr *v.* Leach, 58 N. H. 18.

ery of possession. Where it appeared that the execution was dated May 6, 1869, and the officer's return and the acknowledgment of possession were dated May 3, 1869; and the execution was recorded June 10, 1869, it was apparent from the papers themselves that June 3 was the date intended; but the court held that whether this was so or not, the whole record showed that possession was actually taken on some day between the date of the execution and the date of the record of it, and for the purposes of the case this was all that it was necessary to determine.[1] Evidence aside from the record might be resorted to when necessary, to show when the possession actually began. A voluntary surrender of the premises after judgment of foreclosure does not give possession under the judgment, but merely ordinary peaceable possession under the mortgage. Possession under the judgment can only be delivered on the execution.[2]

In Massachusetts the execution and the officer's return thereon must be recorded in the registry of deeds, in order that the three years necessary for foreclosure shall run from the time of the delivery of seisin, as against any person other than the parties to the action and their heirs and devisees, and those having actual notice.[3]

The judgment will include the entire mortgaged land, although as to part of it the tenants have a right of redemption. Their remedy for this is by a bill in equity.[4]

1307. The fact that the demandant in a writ of entry is a mortgagee does not preclude him from maintaining the action simply to try his title, and to recover possession from one who has disseised him. He is not limited to a conditional judgment except in case he prosecutes the action for the purpose of foreclosing the mortgage.[5] The mortgagee being already in possession of a portion of the mortgaged premises, may maintain a writ of entry against the mortgagor for the remainder, by declaring on his own seisin, without naming the mortgage or asking a judgment as upon a mortgage, and the defendant cannot restrict

[1] Worthy *v.* Warner, 119 Mass. 550.

[2] Riggs *v.* Sholes, 14 N. H. 262.

[3] Gen. Stat. c. 133, § 55; Robbins *v.* Rice, 7 Gray, 202.

[4] Lewis *v.* Babb, 15 Mass. 488, note; Johnson *v.* Brown, 31 N. H. 405.

[5] Boston Bank *v.* Reed, 8 Pick. 459; Haven *v.* Adams, 4 Allen, 80, 93; Stewart *v.* Davis, 63 Me. 539; Partridge *v.* Gordon, 15 Mass. 486; Darling *v.* Chapman, 14 Mass. 101; Loud *v.* Lane, 8 Met. 517; Somes *v.* Skinner, 16 Mass. 348; 3 Pick. 52.

him to such a judgment or object that the plaintiff is attempting to foreclose a part only of the mortgaged land.[1] Whether the writ of entry is brought for the foreclosure of the mortgage, or to try the title and recover possession, depends upon the case disclosed by the pleadings and proof, and not upon the form of the writ.[2]

1308. To obtain a conditional judgment the plaintiff must produce the bond or note on which the mortgage is founded, so that it may be known what payments have been made, and how much is due in equity and good conscience upon the debt. If the mortgagee has assigned the bond or note, and has no interest in the claim, there is no reason why he should have any judgment, although he has never assigned the mortgage. The judgment should only be rendered upon the request of the holder of the note or bond, and upon his producing it.[3]

1309. The judgment should include the whole amount due and payable on the mortgage at the time of entering the judgment, and not merely the amount due at the commencement of the action.[4] It should include the whole amount secured by the mortgage, whether the debt be absolute or contingent, and evidence is admissible to show what is the actual amount secured.[5] Neither is the judgment limited to the amount of the penalty of a bond which the mortgage secures.[6]

1310. When the condition of the mortgage is not for payment of a sum of money, so that a simple conditional judgment in the usual form is all that is necessary, but is for the performance of various duties from time to time, other than the payment of money, any decree which may be made in a suit in equity may be entered from time to time, and as often as necessary, in order to accomplish the purpose of the mortgage.[7]

In such case the court may liquidate the amount due upon the mortgage ;[8] as where it is conditioned for the support of the mortgagee, judgment may be entered for the amount of expense incurred by him in consequence of the breach of the condition up to

[1] Treat *v.* Pierce, 53 Me. 71 ; and see Rev. Stat. of Me. c. 90, § 7.

[2] Blanchard *v.* Kimball, 13 Met. 300.

[3] Vose *v.* Handy, 2 Greenl. 332.

[4] Northy *v.* Northy, 45 N. H. 141 ; Stewart *v.* Clark, 11 Met. 384; Mohn *v.* Hiester, 6 Watts (Pa.), 53 ; Carpenter *v.* Carpenter, 6 R. I. 542.

[5] Freeland *v.* Freeland, 102 Mass. 475.

[6] Pitts *v.* Tilden, 2 Mass. 118.

[7] Stewart *v.* Clark, 11 Met. 384.

[8] Erskine *v.* Townsend, 2 Mass. 493.

the time of rendering judgment.[1] A mortgage provided that the mortgagor should keep a cow for the mortgagee; but he kept it so poorly that the mortgagee was obliged to sell the cow. In an action to foreclose the mortgage, a conditional judgment was entered for the cost of keeping a cow subsequent to the time of the sale. The mortgagor not having offered to keep another cow, or give any assurance that he would keep one properly, it was not regarded as necessary that the mortgagee should purchase a cow and ask the mortgagor to keep her, in order to hold him liable for the keeping.[2]

Questions of fact as to the amount due may be submitted to a jury.[3] Special issues may be framed and questions proposed for this purpose, to be tried and determined by the jury under the direction of court.[4]

1311. Sums paid for protection of the estate. — The mortgagee is entitled to have included in the judgment any sums of money he has paid for taxes, premiums of insurance, or in other ways for the benefit of the mortgagor and the protection of the estate, so far as the mortgage provides that such payments shall become a charge upon the estate.[5] But a mortgagee who has taken his mortgage in part payment of the purchase money of premises conveyed by him to the mortgagor at the same time, by a deed with full covenants of warranty, cannot charge the mortgagor with a sum since paid by him to relieve the premises from a prior mortgage made by him while the owner in fee of the premises, by proof of an oral agreement at the time of making the conveyances that the mortgagor should assume the payment of the prior mortgage, and of a mistake in the drawing of the deeds. The written deed must be taken as proof of the agreement of the parties. The mortgagee can avail himself of such agreement and mistake only by a bill in equity to reform the deed.[6]

1312. Indemnity mortgage. — Where the condition of a mortgage is that the mortgagor shall pay such notes as the mortgagee shall sign for his accommodation, and also a promissory note described in the mortgage, but the only consideration for the mortgage and mortgage note is the signing of an accommodation note

[1] Wilder *v.* Whittemore, 15 Mass. 262.
[2] Fiske *v.* Fiske, 20 Pick. 499.
[3] Slayton *v.* McIntyre, 11 Gray, 271, 275.
[4] Foss *v.* Hildreth, 10 Allen, 76.
[5] See § **1080.**
[6] Ruggles *v.* Barton, 16 Gray, 151.

which the mortgagee paid at maturity, on a writ of entry to foreclose, the conditional judgment should be for the amount of the note paid by the mortgagee with legal interest from the time of payment; and even if the mortgage note and the accommodation note be for the same amount, the transaction cannot be regarded as a loan of that amount, or the mortgage note regarded as the principal debt, so as to carry a higher rate of interest made payable by that note.[1] If after an indemnity mortgage is given the parties themselves agree upon the amount of the liability, the judgment will be for this amount, though it be only a part of the original claim.[2]

1313. In ascertaining the amount of the judgment claims in set-off may be allowed if they are actually mutual, or if the parties have agreed to offset them.[3] Accordingly where the holder of a mortgage was indebted to the mortgagor, and orally agreed with him that he should have the mortgage for the amount of the debt, it was held that the debt should be offset against the mortgage, although such holder had assigned it to another person upon a secret trust to hold for him.[4] But distinct debts cannot be set off aside from any agreement of the parties. The question is not what would be due between the parties upon a settlement of their mutual demands, but what is due on the mortgage.[5] If there are counter claims which by agreement have become an equitable set-off, they should be proved at the trial. Merely presenting the claims without proof on the one side or admission upon the other avails nothing.[6]

1314. Joint-tenants. — If two persons owning land as tenants in common mortgage it to secure the payment of a debt equitably as well as legally due from both, and one is made to pay the whole debt, he by reason of such payment becomes an equitable assignee of the mortgage until the other mortgagor contributes his share, and the mortgagee may be compelled in equity to execute an assignment to him.[7] If, after such a mortgage one tenant makes a second mortgage of his undivided half of the same property to secure his own debt to the same mortgagee, who

[1] Athol Savings Bank *v.* Pomroy, 115 Mass. 573.

[2] Rice *v.* Clark, 10 Met. 500.

[3] Slayton *v.* McIntyre, 11 Gray, 271.

[4] Holbrook *v.* Bliss, 9 Allen, 69; Davis *v.* Thompson, 118 Mass. 497.

[5] Bird *v.* Gill, 12 Gray, 60.

[6] Davis *v.* Thompson, 118 Mass. 497.

[7] Sargent *v.* M'Farland, 8 Pick. 500.

after entering to foreclose under this mortgage, brings a writ of entry against the other tenant to foreclose the first mortgage, the conditional judgment should be for one half of the joint debt; for if this tenant were compelled to pay the whole debt, he would be entitled to the security, and the mortgagee having taken possession of one undivided moiety under the second mortgage, the result is the same in the end: the mortgagee has the benefit of all the security, and circuity of action is avoided.[1] If the money raised by the first mortgage had been for the benefit of one debtor alone, the conditional judgment against him would be for the whole debt, because he would not then be entitled to any protection from the security.

1315. **If nothing is due to the plaintiff upon the mortgage** he is not entitled to any judgment at all, although by reason that the mortgage debt was paid after it became due there has been a breach of the condition, and the technical legal title is still in the mortgagee.[2]

1316. **The judgment, with all benefit of the security and of the possession taken under it, may be assigned.** If the mortgage be formally assigned, the assignee takes the legal title; if only the judgment be assigned, he takes the equitable title; but in either case he has the benefit of all the proceedings taken towards the foreclosure of the mortgage. If the assignment be made to a surety, or any person other than the owner of the equity who pays the judgment, the payment does not avail such owner as a payment of the mortgage debt. Even without any formal assignment either of the judgment or of the mortgage the surety would be equitably subrogated to all benefit of both.[3]

[1] Sargent *v.* M'Farland, 8 Pick. 500.

[2] Slayton *v.* McIntyre, 11 Gray, 271.

[3] Worthy *v.* Warner, 119 Mass. 550. See, also, Hedge *v.* Holmes, 10 Pick. 380.

CHAPTER XXX.

STATUTORY PROVISIONS RELATING TO FORECLOSURE AND REDEMPTION, 1317–1366.

1317. The statutes generally. — An examination of the statutes of the several states in relation to the foreclosure of mortgages can hardly fail to surprise one at the great diversity of systems in use, and at the difference in detail between those which are based upon the same general principles.[1] In general it may be said that a bill in equity for the foreclosure and sale of the property is the prevailing method. But in some states this proceeding is left to the inherent and general jurisdiction of courts of chancery, without any statutory regulations whatever. Formerly the general principles of equity were considered sufficient for conducting and determining the suit in all cases, and there were statutes regulating it in hardly any of the states. Gradually, however, the different states have enacted provisions covering the whole proceeding of foreclosure, so that now this is wholly left to the general equitable jurisdiction and discretion of the courts in chancery only in one state where the common mode of foreclosure is by bill in equity; though in several other states, as in Massachusetts and Pennsylvania, where a foreclosure in equity is allowed only in exceptional cases when the modes in common use are inadequate, the proceedings are under the general equitable jurisdiction of the court. The statutes in some states still leave much to the equitable discretion of the court; while in others such discretion is altogether supplanted by provisions which cover the whole subject in detail.

Aside from the provisions relating directly to the mode of foreclosure, and the rights of the parties before and after foreclosure

[1] This subject well illustrates the need and use of a legal reform which shall have for its object a system of jurisprudence which shall be, if not uniform, at least an approach to uniformity, throughout the United States. See article by P. N. Bowman, in 3 Southern L. Rev. 573, on Inter-State Revision and Codification.

is effected, a fundamental change has been made in the manner of judicial procedure in several states, which should be kept in mind in examining the statutes and decisions of these states upon this subject.

1318. Codes of procedure. — The State of New York, in 1848, adopted a Code of Procedure, the fundamental principle of which is contained in the provision, that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action."[1] The Code does not abolish the distinction between law and equity, which is too deeply impressed upon the jurisprudence of the country to be done away with in any state by any enactment. The civil action is an equitable proceeding, where formerly it would have been a bill in equity. The action for foreclosure under the Code is an equitable proceeding as distinguished from an ordinary one, and is governed by the established principles of equity except where statutes regulate it; and these statutes in general are only embodiments of established principles of equity. So, therefore, foreclosure remains an equitable remedy, although it is obtained under a new name and form. This provision of the New York Code quoted above as comprehending the whole system has been enacted, generally in the same words, in Ohio,[2] Indiana,[3] Wisconsin,[4] Iowa,[5] Minnesota,[6] Missouri,[7] Kansas,[8] Nebraska,[9] Nevada,[10] Oregon,[11] California,[12] Kentucky,[13] North Carolina,[14] South Carolina,[15] and Florida.[16]

1319. In this chapter a statement will be given of the statutory provisions of each state in relation to the foreclosure and redemption of mortgages, excepting only such provisions as relate

[1] 3 R. S. 1875, p. 473; Code, § 69.

[2] Code of Civil Proced. 1874, p. 2; and Rev. Stat. 1860, c. 87, § 3.

[3] St. 1862, Gavin & Hord, vol. 2, p. 33, § 1; Revision, 1876, vol. 2, p. 32.

[4] Rev. Stat. 1871, c. 122, § 8.

[5] Revision, 1873, §§ 2507–2520.

[6] Revision, 1866, c. 66, § 1.

[7] Wagner's Stat. 1870, c. 110, art. 1, § 1.

[8] Gen. Stat. 1868 (Dassler, 1876), c. 80, § 10.

[9] Gen. Stat. 1873, c. 57, § 2.

[10] Compiled Laws, 1873, § 1064.

[11] Gen. Laws, 1872, p. 105.

[12] Code, 1872; Civil Procedure, p. 81.

[13] Code, 1867, p. 2, §§ 1–13.

[14] Battle's Rev. 1873, p. 137; Constitution, § 1, art. 14.

[15] Rev. Stat. 1873, p. 597.

[16] Bush, Dig. of Stat. 1872, p. 457.

to power of sale mortgages, and trust deeds with powers of sale in the nature of mortgages, and the provisions relating to foreclosure by entry and possession used in some of the New England States. Frequently, where the mode and form of proceedings to foreclose are not regulated by statute, these are stated upon the authority of the decisions of the courts. In the notes are given the judicial interpretations of the more important provisions of these statutes, and especially such decisions as illustrate the local laws rather than general principles everywhere applicable.

1320. A mortgage cannot be foreclosed by a special statute enacting that the mortgage has been foreclosed, or that it shall be foreclosed in case the debt be not paid within one year from the passage of the act.[1] Such a statute would be in substance and effect a judicial decree. It is not properly a legislative act. It is, therefore, unconstitutional under a government in which the legislative and judicial powers are vested in different bodies, and also in violation of the Constitution of the United States, as impairing the obligation of the contract between the parties to the mortgage, whereby the mortgagor had the right to redeem according to the general laws of the state.

1321. The law in force when the mortgage was executed must be followed in foreclosing it, though there be a change in the mean time. The remedy so provided becomes a part of the contract of the parties, and any change by statute substantially affecting it, to the injury of the mortgagee, is held to be a law impairing "the obligation of the contract," within the meaning of the Constitution of the United States. Thus a law which provided that the equitable estate of the mortgagor should not be extinguished for twelve months after a sale under a decree in chancery, and which prevents any sale unless two thirds of the amount at which the property has been valued by appraisers shall be bid therefor, cannot be applied in the foreclosure of a mortgage executed before the statute was enacted; but such mortgage must be foreclosed according to the law existing when it was executed.[2]

[1] Ashuelot R. R. Co. *v.* Elliott, 52 N. H. 387.

[2] Bronson *v.* Kinzie, 1 How. 311; Williamson *v.* Doe, 7 Blackf. (Ind.) 12; McCracken *v.* Hayward, 2 How. 608; 17 Pet. 28; Clark *v.* Reyburn, 8 Wall, 318, 322; Ogden *v.* Walters, 12 Kan. 882. See Dow *v.* Chamberlin, 5 McLean, 281. In Wisconsin, however, a statute providing that in foreclosure suits the defendant shall have six months to answer, and that there should be six months' notice of the sale after judgment, was held constitutional; Von Baumback *v.* Bade, 9 Wis. 559;

1322. Alabama. — Foreclosure is by bill in equity.[1] The decree has the force and effect of a judgment, and execution may issue after the property has been sold, the sale confirmed, and the balance ascertained by decree of court. Before so provided by statute it was held that the balance of the debt could only be enforced at law.[2] The proceeding is one not *in rem* but *in personam*, and those who are not parties to it are not bound by the decree.[3] A strict foreclosure may be decreed in proper cases, as where a mortgagee has obtained a release of the equity of redemption of property which is worth nothing above the debt, and he desires to quiet the title.[4]

The fact that a power of sale is conferred upon the mortgagee does not deprive a court of chancery of its jurisdiction to foreclose. The fact that he is incapable of purchasing at his own sale is a reason why this jurisdiction should be retained.[5]

When real estate is sold under a decree in chancery, deed of trust, or power of sale in a mortgage, it may be redeemed within two years. The possession of the land is given to the purchaser within ten days after the sale by the debtor if in his possession, on demand of the purchaser. If the land is in the possession of a tenant, notice to him by the purchaser, or his vendee, of the purchase, after the lapse of ten days from the time of sale, vests the right of possession in him in the same manner as if such tenant had attorned to him. The debtor in order to redeem must pay the purchase money, with interest at the rate of ten per cent. per annum, and all lawful charges. If the purchaser refuses to convey to the debtor, he may recover possession by suit for unlawful detainer. Judgment creditors may redeem in like manner, upon further offering to credit the debtor upon a subsisting judgment, with at least ten per cent. of the amount originally bid for the land. If the purchaser offers to credit the debtor on his judgment a like amount he may retain the land, unless the creditor makes a

Starkweather *v.* Hawes, 10 Wis. 125; but not applicable to pending actions. Ogden *v.* Glidden, 9 Wis. 46; Diedricks *v.* Stronach, 9 Wis. 548.

[1] Code, 1876, § 3908; Rev. Code, 1867, § 3479. Power of sale mortgages are now in common use. See chapter xxxix.

[2] Hunt *v.* Lewin, 4 Stew. & P. 138.

[3] Hunt *v.* Acre, 28 Ala. 580; Boykin *v.* Rain, 28 Ala. 332; Doe *v.* McLoskey, 1 Ala. 708.

[4] Hitchcock *v.* U. S. Bank of Penn. 7 Ala. 386.

[5] Carradine *v.* O'Connor, 21 Ala. 573; Marriott *v.* Givens, 8 Ala. 694; McGowan *v.* Branch Bank of Mobile, 7 Ala. 823; Ala. Life Ins. & Trust Co. *v.* Pettway, 24 Ala. 544.

further offer to credit an additional sum of not less than ten per cent. as before, to which the purchaser may respond, if he choose, with a like offer. One judgment creditor may in like manner redeem from another. Any person redeeming must pay to the person in possession the value of all permanent improvements made by him after he acquired title.[1] The right to redeem after a sale can be enforced only in equity. A tender does not restore the title.[2]

This right to redeem is a personal privilege of the debtor and cannot be asserted by a purchaser of his interest at an execution sale before the statutory right had arisen.[3]

1322 *a*. Arizona Territory.[4] In an action for the foreclosure or satisfaction of a mortgage of real property, the court shall have power by its judgment to direct a sale of the property, or any part of it, and to direct the application of the proceeds to the payment of the amount due on the mortgage, lien, or incumbrance, with costs and execution for the balance. If the debt for which the mortgage, lien, or incumbrance is held be not all due, so soon as sufficient of the property has been sold to pay the amount due with costs, the sale must cease; and afterward, as often as more becomes due for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale. The court may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon or after a sale on execution before a conveyance. If there be a surplus remaining after payment of the amount due on a mortgage, with costs, the court may cause the same to be paid to the person entitled to it, and in the mean time, may direct it to be deposited in court.

The property is subject to redemption. The officer is required to give the purchaser a certificate of the sale, containing a particular description of the property sold; the price bid for each distinct

[1] Code, 1876, §§ 2877–2887.

[2] Smith *v.* Anders, 21 Ala. 782.

[3] Childres *v.* Monette, 54 Ala. 317.

[4] Compiled Laws, 1877, §§ 2684–2686, 2698, 2699, 2667–2675.

lot or parcel; the whole price paid; and a duplicate certificate must be filed by the officer with the recorder of the county. Redemption may be made by the debtor or his successor in interest, or by any creditor having a lien by judgment or mortgage within six months from the sale on paying the purchaser the amount paid by him with eighteen per cent. thereon in addition with taxes; and if the purchaser be a creditor having a prior lien, that must also be paid. Any other creditor may redeem within sixty days after the last redemption on paying the amount paid on such last redemption with six per cent. addition.

1323. Arkansas.[1] — Mortgages are foreclosed by complaint against the mortgagor and the actual occupants [2] of the real estate praying judgment for the debt, and that the equity of redemption may be foreclosed, and the property sold. This must be filed in the county where the premises or some part of them are situate. The proceedings are of an equitable character, and are governed by the principles and practice of courts of equity.[3]

It is not necessary to enter an interlocutory judgment, or give time for the payment of money, or for doing any other act; but final judgment may be given in the first instance. A sale is ordered in all cases. Judgment may be rendered for the sale of the property and for the recovery of the debt against the defendant personally.

All sales of real property are made on a credit of not less than three nor more than six months, or on instalments equivalent to not more than four months' credit on the whole, to be determined by the court. In all sales on credit the purchaser must execute a bond, with a good surety to be approved by the person making the sale, which bond has the force of a judgment, and a lien is retained on the property for its price. If the mortgage be not satisfied by the sale, an execution may issue against the defendant as in ordinary judgments.

[1] Dig. of Stat. 1874, §§ 4705–4709. For form of complaint, see p. 1046. Trust deeds are in use here. Equity has no jurisdiction of a proceeding *in rem* against real estate to foreclose a mortgage upon it, without making any person defendant. This could be authorized only by statute. State *v.* Bailey, 27 Ark. 473.

[2] The actual occupant, if there be one, must be made a party, or the petition must show that there is no occupant, or that the mortgagor is the occupant. McLain *v.* Smith, 4 Ark. 244; Jett *v.* Schaffer, 5 Ark. 254; Buckner *v.* Sessions, 27 Ark. 219, 225; Fletcher *v.* Hutchinson, 25 Ark. 30.

[3] McLain *v.* Smith, *supra;* Price *v.* State Bank, 14 Ark. 50.

1324. California.[1] — Foreclosure is a matter of equity jurisdiction.[2] There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate. In such action the court may by its judgment direct a sale of the incumbered property, or so much thereof as may be necessary, and the application of the proceeds of the sale to the payment of the costs and expenses of sale and the amount due to the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued.[3] Subsequent parties in interest not appearing of record need not be made parties to the action; and judgment is conclusive against them. Any surplus there may be the court may cause to be paid to the person entitled to it, and in the mean time may direct it to be deposited in court. When the debt is not all due, so soon as sufficient property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due for principal or interest, the court may on motion order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

The officer gives the purchaser a certificate of sale, stating the price bid, the whole price paid, and whether subject to redemption. Redemption may be made by the judgment debtor or his successor in interest, in the whole or any part of the property; or by a creditor having a lien by judgment or mortgage on the property or any part of it. Such creditors are called redemptioners. The judgment debtor or redemptioner may redeem within six months after the sale, on paying the purchaser the amount of his purchase, with two per cent. per month thereon in addition, with

[1] Code of Civil Procedure, §§ 726–728.

[2] Willis *v.* Farley, 24 Cal. 490.

[3] As to form of judgment, see Leviston *v.* Swan, 33 Cal. 480. The personal judgment cannot be docketed before the sale. Cormerais *v.* Genella, 22 Cal. 116. It should first be ascertained by the court or by a master what balance is due. Hunt *v.* Dohrs, 39 Cal. 304; Gray *v.* Franklin, 5 Cal. 416. The clerk of court may then without further order docket the judgment and issue a general execution. Leviston *v.* Swan, 33 Cal. 480.

any taxes the purchaser may have paid; and if the purchaser be a creditor having a prior lien, the amount of such lien with interest.[1] If a redemptioner redeem, the judgment debtor or another redemptioner may within sixty days after the last redemption again redeem, on paying the sum paid on the last redemption with four per cent. thereon in addition.[2] And successive redemptions may be made in the same manner. If no redemption be made within six months after sale, the purchaser is entitled to a conveyance.

A purchaser from the time of sale, and a redemptioner till another redemption, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation. The amount received must be credited on the redemption money to be paid.[3] If the purchaser be evicted for any irregularity in the sale, he may recover the amount of the purchase money with interest from the judgment creditor.[4]

When a personal judgment is rendered against the defendant, and also a decree in equity awarded for the sale of the property, the plaintiff may pursue either remedy, but he cannot use both at the same time. If he enforce the execution on the personal judgment first,[5] the money realized on it must be applied upon it, and a sale of the property under the decree made for the balance, or *vice versa*.[6] The personal judgment does not become a lien upon other real estate of the defendant until the mortgaged property has been sold, and the deficiency of the debt reported and docketed by the clerk of the court.[7] It then applies only for this deficiency.[8]

When part of the debt is not due at the time of the decree, there can be no judgment for the recovery of the balance not due from the defendant. The decree should be so modified as to exclude the recovery of the part of the debt not due. The power of the court under the statute is exhausted by decreeing a sale of

[1] Code of Civil Procedure, § 702, and Amendment to Code of Civil Procedure, Feb. 13, 1876, p. 96.

[2] Code, *supra*, § 703; Amendments, 1874, p. 323.

[3] Code, *supra*, § 707.

[4] Code, *supra*, § 708.

[5] If the plaintiff takes a personal judgment only and strikes out the prayer for a sale of the premises, he waives all right to this. Ladd *v.* Ruggles, 23 Cal. 232.

[6] England *v.* Lewis, 25 Cal. 337.

[7] Rowland *v.* Leiby, 14 Cal. 156; Rowe *v.* Table Mountain Water Co. 10 Cal. 441.

[8] Culver *v.* Rogers, 28 Cal. 520; Cormerais *v.* Genella, 22 Cal. 116.

the entire property, though only part of the debt was due.[1] In all cases of foreclosure the attorney's fee is fixed by the court in which the proceedings are had without reference to any stipulation in the mortgage.[2]

1325. Colorado.[3] — Actions for the foreclosure of mortgages of real property must be tried in the county in which the subject of the action, or some part thereof is situated, provided that where such real property is situated partly in one county and partly in another, the plaintiff must bring his action in the county where the greater portion of such real estate is situate, and the county so selected is the proper county for the trial of any or all such actions. There is but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property. The court has power, by its judgment, to direct a sale of the incumbered property, or so much as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court and expenses of the sale and the amount due to the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment is docketed for such balance against the defendant or defendants personally liable for the debt, and then becomes a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued. No person holding a conveyance from or under the mortgagor, or of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear on record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien, as if he had been made a party to said action, and in all respects have the same force and effect. If the debt for which the mortgage, lien, or incumbrance is held, be not all due, so soon as sufficient of the property has been sold to pay the amount due with costs, the sale must cease, and afterwards as often as more becomes due for principal or interest, the court may, on motion, order more to be sold.

The court may, by injunction, on good cause shown, restrain

[1] Taggart *v.* San Antonio Ridge Ditch & Mining Co. 18 Cal. 460.

[2] Stat. 1874, p. 707.

[3] Code of Civil Procedure, 1877, §§ 22, 229, 231, 244.

the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon, or after a sale on execution before a conveyance.

1326. Connecticut.[1] — Mortgages are foreclosed in a court of chancery. The decree is for a strict foreclosure, whereby the title becomes absolute in the mortgagee, on the mortgagor's failure to redeem within the time limited by the decree, which is usually from two to six months. There can be no decree for the sale of the property.[2] The court may enforce a delivery of possession to the mortgagee after the time allowed for redemption has expired. Formerly a foreclosure did not preclude the mortgage creditor from recovering so much of the claim as the property mortgaged, estimated at the expiration of the time limited for redemption, is insufficient to satisfy; and the bringing of an action upon such claim after foreclosure obtained did not open the foreclosure.[3] The value of the property mortgaged, at the expiration of said time, was ascertained by the court before which the action was pending; and the creditor recovered only the difference between such value and the amount of his claim. But in 1878 it was provided that the foreclosure of a mortgage shall be a bar to any further suit or action upon the mortgage debt or obligation, unless the person or persons who are liable for the payment thereof are made parties to such foreclosure. Upon the motion of any party to a foreclosure, the court appoints three disinterested appraisers, who shall, under oath, appraise the mortgaged property within ten days after the time limited for redemption shall have expired, and shall make written report of their appraisal to the clerk of the court where said foreclosure was had, which report shall be a part of the files of such foreclosure suit, and such appraisal shall be final and conclusive as to the value of said mortgaged property; and the mortgage creditor in any further suit or action upon the mortgage debt, note, or obligation, shall recover only the difference between the value of the mortgaged property as fixed by such appraisal and the amount of his claim.[4] When a mortgage has been foreclosed, and the time limited for redemption has passed, and the title to the premises has become absolute

[1] G. S. 1875, p. 358.

[2] In Palmer *v.* Mead, 7 Conn. 149, 152, Chief Justice Hosmer spoke of a sale of the mortgaged premises on foreclosure as "a proceeding never admitted here."

[3] Previous to the statute, passed originally in 1833, there could be no suit for the balance without opening the foreclosure. M'Ewen *v.* Welles, 1 Root, 203.

[4] Acts, 1878, c. 129.

in the mortgage creditor, he must sign a certificate describing the premises, the deed of mortgage on which the foreclosure was had, the book and page of record, and the time when the title became absolute; which certificate must be recorded in the records of the town where the premises are situated.[1] When the mortgage has been assigned, the title to the premises, upon the expiration of the time limited for redemption and on failure to redeem, vests in the assignee, in the same manner and to the same extent as it would have vested in the mortgagee, provided the person so foreclosing shall forthwith cause the decree of foreclosure to be recorded in the records of the town where the land lies.[2] The pendency of a petition for the foreclosure of any mortgage of or lien upon any real or personal estate is not notice thereof to any person who shall acquire an interest in such estate during the pendency of such petition, unless the officer, making service of said petition, shall leave a true and attested copy thereof at the office of the town clerk of the town in which such mortgage or lien is recorded, at least twelve days before the return day of such petition; and no decree of foreclosure obtained upon any petition of which a copy shall not be left at the town clerk's office as herein provided, can in anywise affect the rights of any person acquiring interest in the property incumbered by such mortgage or lien, during the pendency of the petition brought for the foreclosure thereof. It is the duty of every officer serving a petition for the foreclosure of any mortgage or lien to leave a true and attested copy of such petition at the town clerk's office in the town where such mortgage or lien is recorded, at least twelve days before the return day of said petition.[3] Whenever any foreclosure or other suit in equity is brought asking for relief in relation to lands, the petitioner may in his bill pray for the possession of such lands, and the court may, if it grant his petition, and find he is entitled to the possession of such lands, issue its execution of ejectment, commanding the officer to eject the person in possession of such lands, and to place the petitioner in possession thereof; and such officer shall proceed with such execution in the same manner as in executions in ejectment at law; but no execution can issue against any persons in possession who are not made parties to the petition.[4]

[1] G. S. 1875, p. 358, § 3.
[2] G. S. 1875, p. 358, § 5.
[3] Acts, 1877, c. 133.
[4] Acts, 1875, c. 54.

1327. Dakota Territory.[1] — Foreclosure is by an equitable suit in accordance with the Code. The action must be brought in the district court of the county where the premises or some part of them are situated; judgment may be rendered for the amount of the debt against the mortgagor, and a decree may be made for the sale of the premises, or of such part as may be sufficient to pay the amount of the judgment. The court may order and compel the delivery of the possession of the premises to the purchaser after the expiration of one year from the sale; and may direct an execution to issue for the balance remaining unsatisfied. While this action is pending, no proceedings at law can be had for the recovery of the debt or any part of it unless authorized by the court. If any person other than the mortgagor is liable for the debt, a judgment for the balance remaining unsatisfied after the sale may be entered against him as well as the mortgagor, and may be enforced by execution or other process. The complainant must state in his complaint whether any proceedings have been had at law or otherwise for the recovery of the debt; and if any execution has been issued for any part of the debt, the proceedings cannot go on unless the execution be returned unsatisfied in whole or in part, and that the defendant has no property whereon to satisfy it, except the mortgaged premises.

Sales under a decree of foreclosure are made by a referee, sheriff, or deputy sheriff of the county, or other person appointed by the court, in the county or subdivision of it where the premises or some part of them are situated. The officer making the sale must give to the purchaser a certificate in writing, setting forth the sum paid and the time when the purchaser will be entitled to a deed, unless redeemed; and if the premises are not redeemed within one year from the time of sale, he executes a deed to the purchaser. Redemption within that time may be made by paying the purchaser the sum for which the premises were sold, with interest at the rate of ten per cent. per annum. The proceeds of the sale are applied to the payment of the debt, and any surplus there may be is brought into court for the use of the persons entitled to it.

When the action is brought for an instalment of the debt or of the interest, and other instalments are not then due, the bill is dismissed upon payment at any time before the decree of sale of the

[1] R. C. 1877, pp. 616–619.

principal and interest due, with costs. If, after a decree of sale, the money is brought into court, the proceedings are stayed until a further default, in case of which the court may enforce the collection of such subsequent instalment. The court may direct a reference to a master to ascertain whether the premises shall be sold in parcels or together, and may direct the sale to be made accordingly. If it appears that a sale of the whole together will be most beneficial to the parties, the decree may be in the first instance entered for the sale of the whole. In that case the proceeds are applied to the payment as well of the part of the debt already due as that which is not then due; and if the residue which is not then payable does not bear interest, a proper rebate of interest is made.

1328. Delaware.[1] — Foreclosure is by *scire facias*. Upon breach of the condition of a mortgage by non-payment of the mortgage money, or non-performance of the conditions stipulated in such mortgage, at the times and in the manner therein provided, the mortgagee, his heirs, executors, administrator, or assigns, may, in the county where the premises are situated, sue out a writ of *scire facias*, directed to the sheriff, commanding him to make known to the mortgagor, his heirs, executors, or administrators, that he or they show cause why the premises ought not to be taken on execution for payment of said money and interest, or to satisfy the damages which the plaintiff shall suggest for the non-performance of said conditions. The defendant may plead satisfaction or other plea in avoidance of the deed. Judgment is entered that the plaintiff have execution by *levari facias*, under which the premises are sold, and after confirmation of the sale conveyed to the purchaser, who takes a title discharged of all equity of redemption, and all other incumbrances made by the mortgagor, his heirs, or assigns. Any overplus is rendered to the debtor or defendant.

But if there be no sale for want of bidders return is made accordingly, and thereupon a *liberari facias* may issue, under which the officer delivers to the plaintiff such part of the premises as shall satisfy his debt or damages with interest and costs, according to the valuation of twelve men, to hold to him as his free tenement in satisfaction of his debt, or so much of it as the premises by the valuation amount to. If they fall short of satisfying the

[1] R. C. 1874, p. 687.

whole debt, the plaintiff may have execution for the residue. The execution and return pass the title.[1]

1329. **District of Columbia.**[2] — Foreclosure is under the general equity jurisdiction of the court. The only statutory provision relating to it is that publication may be substituted for personal service of process upon any defendant who cannot be found. Deeds of trust are, however, almost exclusively used.

1330. **Florida.**[3] — Foreclosure may be had by petition in a court of common law, although the courts of equity also have jurisdiction of the subject; but inasmuch as the statutory provisions for foreclosing by petition allow a personal judgment for any balance of the mortgage debt remaining unsatisfied after a sale of the premises, this is the more convenient method.[4] The statutory process of foreclosure in a court of common law is not distinctively a common law action; it is in fact conducted according to equitable principles. It is brought in the circuit court of the county where the lands lie, and, like a bill in equity, sets forth the parties to the mortgage and the petitioner's title, and describes the premises and the debt secured.

The object of the statute allowing foreclosure by petition was to prevent the necessity of two suits; one in equity to foreclose, and a suit at law on the bond or note. The proceedings are *in rem* as to the foreclosure, and *in personam* as to the judgment for the debt or demand. In order to use this process there must be property upon which the decree of foreclosure can act.

Before this statute the mortgagee had his option to proceed in equity against the property, or at law on his bond or note; and he may now as formerly pursue either remedy or both at the same time, but not in the same forum or in the same suit. This can only be accomplished by means of the statute.[5]

The petition prays that the mortgagor and all persons claiming under him be barred of all equity of redemption. The original mortgage, or a copy of it duly certified, must form a part of every petition or bill of complaint for foreclosure.[6] It is filed at least four months before the term of the court at which the judgment of foreclosure can be rendered. When the mortgagor or person

[1] R. C. p. 682.
[2] R. S. 1874, p. 93.
[3] Bush's Dig. of Stat. pp. 606, 607; Laws, 1874, p. 75.
[4] Judge *v.* Forsyth, 11 Fla. 257.
[5] Judge *v.* Forsyth, 11 Fla. 257.
[6] Laws of Florida, 1874, p. 75.

interested in the equity resides out of the state, notice must be given by publication in some newspaper printed within the district, or that next adjoining, once every two weeks for at least four months before the first day of the term. Such publication must also be made when the party resides in the state but is beyond the reach of process. In all other cases personal service must be made.

Judgment on the foreclosure of a mortgage is entered up and execution issued as in other cases.

The court has power to adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain due and unsatisfied after a sale of the mortgaged premises.[1] In cases in which the mortgagor is personally liable for the debt secured by such mortgage, and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action; and the court may adjudge payment of the residue of such debt remaining due and unsatisfied, after the sale of the mortgaged premises, against such other person, and may enforce such judgment as in other cases. Upon sale under execution the officer executes a deed to the purchaser, and pays any surplus to the defendant. There is no redemption.[2]

1331. Georgia.[3] — Foreclosures may be had by a bill in equity when the mode provided by statute is inadequate.[4] Mortgages are usually foreclosed by petition, which must be to the court in the county where the property is situated. This is a proceeding

[1] Dig. of Stat. pp. 489, 490.

[2] Dig. of Stat. p. 330.

[3] Code, 1873, §§ 3962–3968. This mode of foreclosure is a substitute for a bill in equity. It is not absolutely necessary as in equity that all parties in interest should be made parties, in order that the judgment should be binding upon them; as, for instance, the judgment is binding upon a purchaser of the equity of redemption, although he was not made a party to the proceeding. Knowles *v.* Lawton, 18 Ga. 476; Johnston *v.* Crawley, 22 Ga. 348; S. C. 25 Ga. 316; Guerin *v.* Danforth, 45 Ga. 493, 496. No parties to the suit are necessary other than the mortgagor and mortgagee. If the rights of other persons are interfered with, they are not allowed to interpose any claim in the suit, but may have their remedy when the mortgage execution is sought to be enforced against the land. Jackson *v.* Stanford, 19 Ga. 14; Howard *v.* Gresham, 27 Ga. 347. As to jurisdiction, a court in another county, though it be the county of the mortgagor's residence, has none. The proceedings of such court would be void. Hackenhull *v.* Westbrook, 53 Ga. 285.

[4] May *v.* Rawson, 21 Ga. 461; Dixon *v.* Cuyler, 27 Ga. 248, 251. A remedy at law being provided, jurisdiction in equity is lost when this remedy is complete.

at law. The court grants a rule *nisi* directing the principal, interest, and costs to be paid into court on or before the first day of the next term immediately succeeding the one at which the rule is granted, which rule is published once a month for four months, or served on the mortgagor, or his special agent or attorney, at least three months previous to the time at which the money is directed to be paid into court.[1] At the term at which the money is directed to be paid the mortgagor may set up and avail himself of any defence which he might lawfully set up in an ordinary suit instituted on the debt secured by such mortgage.[2] The issue is tried by a special jury.

It is not competent for any third person to interpose a defence; nor will the court itself, of its own motion, do so.[3] When the mortgagor is dead, the proceeding may be instituted against his executor or administrator.[4] Judgment is entered for the amount due, and the property is ordered to be sold in the manner of a sale under execution from which there is no redemption.[5] The proceeds, after paying the mortgage, are paid to the mortgagor or his agent. If the mortgage is given to secure a debt due by instalments, and is foreclosed before they are all due, and there is a surplus, the court may retain the funds, or order the same to be invested to meet the instalments still unpaid. A creditor of the mortgagor wishing to contest the validity or fairness of the mortgage debt may make affidavit of the facts upon which he relies, and upon filing the same with the levying officer, with a bond and good security payable to the mortgagee, conditioned to pay all costs and damages incurred by the delay if the issue be found against him, the officer returns the same to the court at which the

[1] When the rule has been made absolute there is no appeal from it. Clifton *v.* Livor, 24 Ga. 91. It need not show on its face what particular credits were allowed in fixing the amount of the debt. Cherry *v.* Home Building & Loan Asso. 57 Ga. 361.

[2] Dixon *v.* Cuyler, 27 Ga. 248.

[3] Sutton *v.* Sutton, 25 Ga. 383; Jackson *v.* Stanford, 19 Ga. 14.

[4] If there is no administrator, and the equity of redemption has been assigned, the proceeding should be in equity. May *v.* Rawson, 21 Ga. 461.

[5] See Dickerson *v.* Powell, 21 Ga. 143. This proceeding by petition is not confined to mortgages made to secure liquidated demands. Richards *v.* Bibb Co. Loan Association, 24 Ga. 198. The judgment is not conclusive against one interested in the property who was not made a party to the proceedings, as, for instance, one who has purchased the property prior to the commencement of proceedings. Upon the levy of the execution he may go behind the judgment, and claim that the mortgage was barred by the statute of limitations. Williams *v.* Terrell, 54 Ga. 462.

mortgage *fi. fa.* is made returnable to be tried.[1] If the mortgage secures instalments or several debts falling due at different times, the mortgagee may foreclose when the first becomes due, and the court will control the surplus so as to protect the debts not due; and so if there be several mortgages of equal date embraced in the same mortgage, and one foreclose, the court controls the funds to distribute to the several mortgagees according to their several claims.[2]

1332. Idaho Territory.[3] — There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, in which action the court may by its judgment direct a sale of the incumbered property, or so much thereof as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due to the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant personally for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases, on which execution may be issued. No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon; which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action. If there be surplus money remaining after payment of the amount due on the mortgage, lien, or incumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the mean time may direct it to be deposited in court. If the debt for which the mortgage, lien, or incumbrance is held be not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease; and afterwards, as often as more becomes due for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be

[1] Code, 1873, § 3979.

[2] Code, 1873, §§ 1965, 1966.

[3] Rev. Laws, 1875, §§ 267, 269, of Civil Proceedings, p. 144.

ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

1333. Illinois. — Mortgages may be foreclosed in equity although the statutory provisions relate chiefly to proceedings by *scire facias*, and to sales under powers contained in mortgages.[1] In equity a decree may be rendered for any balance of money that may be found due over and above the proceeds of the sale, and execution may issue for the collection of such balance in the same way as when the decree is solely for the payment of money. Such decree may be rendered conditionally at the time of decreeing the foreclosure, or it may be rendered after the sale and the ascertainment of the balance due.[2]

The court in proper cases will decree a strict foreclosure; but this is not allowed in case of mortgages by executors, guardians, and conservators.[3]

Foreclosure by Scire Facias.[4]

If default be made in the payment of a mortgage duly executed and recorded, and if it be payable by instalments and the last instalment has become due, a writ of *scire facias* may be sued out of the circuit court of the county where the lands or any part of them are situated, requiring the mortgagor, or his representatives, to show cause why judgment should not be rendered for the amount due under the mortgage. No declaration need be filed. The defendant may set off any demand in his favor.[5] Judgment is rendered for the amount found due, and the premises are sold to satisfy it. Such judgment does not create a lien on any other lands than the mortgaged premises, nor is any other property of

[1] See Statutes on Power of Sale Mortgages, chapter xxxix.

[2] R. S. 1874, p. 714; R. S. 1877, p. 676.

[3] R. S. 1877, pp. 120, 540, 653.

[4] R. S. 1874, p. 714; R. S. 1877, p. 677. For form of this writ see Woodbury *v.* Manlove, 14 Ill. 213; approved in Osgood *v.* Stevens, 25 Ill. 89. When foreclosure is by *scire facias*, subsequent incumbrancers are cut off, though not made direct parties to the proceeding. Kenyon *v.* Shreck, 52 Ill. 382; Matteson *v.* Thomas, 41 Ill. 110. Failure or want of consideration cannot be shown in this proceeding. Fitzgerald *v.* Forristal, 48 Ill. 228; Woodbury *v.* Manlove, 14 Ill. 213. This is a proceeding upon the mortgage, and must be by the mortgagee holding the legal title. It does not matter that the note has been assigned. Camp *v.* Small, 44 Ill. 37; Olds *v.* Cummings, 31 Ill. 188.

[5] See Henderson *v.* Palmer, 71 Ill. 579. No defence can be interposed except payment, or that the mortgage was never a valid lien. Camp *v.* Small, *supra*.

the mortgagor liable to satisfy the same except such other property as the mortgagor has given as collateral security for this purpose. This is purely a proceeding at law, and is governed by the practice of courts of law and not of equity.[1]

The action must be brought by the person who holds the legal title to the mortgage, and consequently if the note alone has been assigned the suit should be brought by the mortgagee.[2] No persons but the mortgagor, or, in case of his death, his executor or administrator, are required to be made parties. If the wife joined in the mortgage she is a necessary party. The mortgagor's assignee in bankruptcy is not a necessary party.[3] All persons beyond the parties to the suit are required to take notice of the proceedings and to protect their rights.[4] No defence can be interposed except payment or release, or that the mortgage was invalid.[5] Usury cannot be set up;[6] nor the want or failure of consideration.[7] This form of foreclosure cannot be used in case of a mortgage made to secure the delivery of specific articles. It cannot be maintained till the last instalment of the mortgage is due, and this fact should be alleged. Any remedy before this must be sought by ejectment, or by bill in chancery.[8] The purchaser at a sale under a judgment in such action takes all the interest in the land which the mortgagor had when he executed the mortgage.[9] The mortgagor, or his grantees since the mortgage, may redeem, as in the case of an ordinary sale on execution. The judgment is against the property and not against the person.[10]

When a sale is made by virtue of an execution, judgment, or decree of foreclosure, the officer gives a certificate of sale.[11] The owner of the equity or any person interested in it may redeem at any time within twelve months from the sale, by paying the

[1] Tucker *v.* Conwell, 67 Ill. 552; Woodbury *v.* Manlove, 14 Ill. 213.

[2] Camp *v.* Small, 44 Ill. 37.

[3] Gilbert *v.* Maggord, 1 Scam. 471.

[4] Chickering *v.* Failes, 26 Ill. 507.

[5] Camp *v.* Small, *supra;* White *v.* Watkins, 23 Ill. 480.

[6] Carpenter *v* Mooers, 26 Ill. 162.

[7] Hall *v.* Byrne, 1 Scam. 140; McCumber *v.* Gilman, 13 Ill. 542.

[8] Osgood *v.* Stevens, 25 Ill. 89; Carroll *v.* Ballance, 26 Ill. 9; Fickes *v.* Erseck, 1 Rawle (Pa.), 166; Day *v.* Cushman, 1 Scam. 475.

[9] State Bank *v.* Wilson, 9 Ill. 57. See, also, Walbridge *v.* Day, 31 Ill. 379.

[10] Osgood *v.* Stevens, *supra;* Marshall *v.* Maury, 1 Scam. 231; State Bank of Ill. *v.* Wilson, 9 Ill. 57.

[11] R. S. 1877, p. 596. A certificate of purchase issued to a person other than the one who, by the sheriff's return, is shown to be the purchaser, is void. Dickerman *v.* Burgess, 20 Ill. 266.

amount bid, with interest at the rate of ten per cent. per annum.[1] A judgment creditor may redeem after twelve months and within fifteen months after the sale, and there may be successive redemptions within sixty days from the last redemption.[2] After the expiration of the time of redemption the party entitled to possession, after a demand in writing, may have summary process to recover it.

1334. Indiana.[3] — Foreclosure is by complaint in the court of common pleas or circuit court where the land lies. If the land lies in more than one county the court of either has jurisdiction.[4] It is sufficient to make the mortgagee, or the assignee shown by said record to hold an interest therein, defendants. All persons failing to cause assignments to them to be made or put of record, unless they cause themselves to be made parties pending the action, are bound by such decree as may be rendered, the same as if they had been made parties to the suit. And any purchaser at a judicial sale of the mortgaged premises, or any part thereof, under such decree, or claiming title under the same, buying without actual notice of any assignment not then of record, or of the transfer of any note, the holder whereof was not a party to the action, holds the premises, so purchased, free and discharged of such lien.

[1] Seligman *v.* Laubheimer, 58 Ill. 124. The payment required is the amount bid at the sale, and not the amount of the mortgage debt. The construction of the Iowa statute is different, requiring payment of the amount of the debt instead of the amount bid. Stoddard *v.* Forbes, 13 Iowa, 296; Johnson *v.* Harmon, 19 Iowa, 56. The case of Bradley *v.* Snyder, 14 Ill. 263, is not contrary to this, as the redemption in the latter was not strictly a statutory right. There can be no decree for sale without redemption. Farrell *v.* Parlier, 50 Ill. 274.

[2] A purchaser of the equity of redemption is allowed the twelve months for redemption prescribed for the mortgagor, and not the fifteen allowed a judgment creditor. Dunn *v.* Rodgers, 43 Ill. 260. The judgment creditor, upon redemption, is subrogated to all the rights of the purchaser under the foreclosure sale. Lamb *v.* Richards, 43 Ill. 312. He may redeem against a second mortgagee who has taken an assignment of the certificate of purchase. Grob *v.* Cushman, 45 Ill. 119; Forcible Entry and Detainer Act, § 2; Rev. Stat. 1874, p. 535.

[3] Revision, 1876. vol. 2, p. 259; Gavin & Hord, 1862, vol. 2, p. 289.

[4] Holmes *v.* Taylor, 48 Ind. 169. The form of complaint given by statute is as follows: "A. B. complains of C. D., and says that the defendant executed a mortgage conveying to the plaintiff the tract of land therein described, as security for the payment of a debt evidenced by a note, a copy of each of which is filed herewith, amounting to dollars, which yet remains unpaid: wherefore he asks judgment for dollars, and the foreclosure of the mortgage, and sale of the property, or so much thereof as may be necessary to pay his debt, and for other relief." Ib. p. 359. There can be no foreclosure except by judicial sale, and therefore power of sale mortgages and trust deeds are not in use.

But any assignee or transferee may redeem said premises, like any other creditor, during the period of one year allowed by statute after such sales.[1] If there be no express agreement in the mortgage, nor any separate instrument secured, the remedy is confined to the property mortgaged. The premises, or so much thereof as may be necessary, are sold to satisfy the mortgage. Payment of the debt with interest and costs at any time before sale satisfies the judgment. In the order of sale the court directs that the balance due on the mortgage and costs, which remain unsatisfied after sale, shall be levied of any property of the mortgage debtor. Actions on the debt or note and to foreclose the mortgage cannot be prosecuted at the same time. When the complaint is in consequence of the non-payment of an instalment of interest or of the principal, and the whole debt is not due, it is dismissed on payment into court at any time before judgment of the amount then due; if the payment be made after final judgment, proceedings thereon are stayed, subject to be enforced upon a subsequent default. In the final judgment the court directs at what time execution shall issue.[2] The court in such cases ascertains whether the property can be sold in parcels, and if this can be done without injury, it directs so much only of the premises to be sold as will be sufficient to pay the amount due on the mortgage with costs. If the premises cannot be sold in parcels the court orders the whole to be sold, and the proceeds applied first to the payment of the principal due, interest, and costs, and then to the residue secured and not due, with a proper discount of interest.[3]

[1] As to notice of pendency of suit to non-resident holder of the equity of redemption, see 2 R. S. 1876, p. 49; Fontaine *v.* Houston, 58 Ind. 316; Acts, 1877, c. 58, § 2.

[2] See Skelton *v.* Ward, 51 Ind. 46.

[3] Generally when divisible the premises should be sold in parcels. Frame *v.* Bell, 16 Ind. 229; Dale *v.* Bugh, 16 Ind. 233; Piel *v.* Brayer, 30 Ind. 332. This statute, however, applies only to cases where part of the mortgage is not due. Harris *v.* Makepeace, 13 Ind. 560; Smith *v.* Pierce, 15 Ind. 210; Benton *v.* Wood, 17 Ind. 260; Denny *v.* Graeter, 20 Ind. 20. Whether the premises are susceptible of division is a question for the court to decide. The court must also direct the order of sale. A decree giving the plaintiff the right to direct the sale is erroneous. Knarr *v.* Conaway, 42 Ind. 260. The failure of the court to determine whether the premises are divisible does not render the order of sale void; but it may be set aside on seasonable application. Cassel *v.* Cassel 26 Ind. 90; Thompson *v.* Davis, 29 Ind. 264. The sale must be made according to the statute in force when the mortgage was executed. Wolf *v.* Heath, 7 Blackf. 154; Franklin *v.* Thurston, 8 Blackf. 160. If the land is situate in two counties, the part in each must be sold at the door of the court-house of the county where it is situated. Holmes *v.* Taylor, 48 Ind. 169.

In making sale the sheriff or other officer issues to the purchaser a certificate, which entitles the holder of it to a deed of conveyance, to be executed by the officer at the expiration of one year from the date of the sale, if the property has not been previously redeemed.[1] The debtor is in the mean time entitled to the possession of the premises, but in case they are not redeemed he is liable to the purchaser for their reasonable rents and profits. Redemption may be made by any one having an interest in the property at any time within one year from the date of sale, by paying to the purchaser, or to the clerk of the court from which the order of sale was issued for the use of the purchaser, the amount of the purchase money, with interest at the rate of ten per cent. per annum.[2] When a mortgagee or judgment creditor redeems, he retains a lien on the premises for the amount paid for redemption against the owner or any junior incumbrancer.[3]

1335. Iowa.[4] — All deeds of trust and mortgages of real estate, whether they contain a power of sale or not, must be foreclosed by an equitable proceeding in court. In such action judgment is entered for the entire amount found due, and under a special execution the property, or so much as is necessary, is sold to satisfy it with interest and costs. If the property does not sell for enough to satisfy the judgment, a general execution may be issued for the balance, unless the parties have stipulated otherwise.[5] A personal judgment cannot be rendered against a subsequent

[1] The certificate of purchase may be assigned, and the deed is then made to the assignee. Splahn *v.* Gillespie, 48 Ind. 397; Davis *v.* Langsdale, 41 Ind. 399. On the decease of the holder of the certificate, the deed may be made to his heirs or devisees. Sumner *v.* Palmer, 10 Rich. (S. C.) L. 38; McElmurray *v.* Ardis, 3 Strob. (S. C.) L. 212; Swink *v.* Thompson, 31 Mo. 336.

[2] A liberal construction should be given to the right of redemption. A holder of one of several mortgage notes who has filed a cross-bill in proceedings by the holder of another note, and obtained a judgment for foreclosure as to the note held by him, may redeem from the foreclosure sale, as a judgment creditor. Davis *v.* Langsdale, 41 Ind. 399. A mortgagee having a judgment for a deficiency may also redeem. Greene *v.* Doane, 57 Ind. 186. See § **1069**.

[3] Statutes of Indiana, Gavin & Hord, vol. 2, p. 251; Revision, 1876, vol. 2, p. 220.

[4] See Code, 1873, §§ 3319–3330. This is a statutory proceeding, to which the court will apply the principles both of law and of equity. Kramer *v.* Rebman, 9 Iowa, 114; McDowell *v.* Lloyd, 22 Iowa, 448; Hartman *v.* Clarke, 11 Iowa, 510; Packard *v.* Kingman, 11 Iowa, 221.

[5] Chittenden *v.* Gossage, 18 Iowa, 158; Kennion *v.* Kelsey, 10 Iowa, 443; Elmore *v.* Higgins, 20 Iowa, 250.

purchaser who has not assumed the mortgage.[1] But a subsequent purchaser who has assumed the payment of the mortgage debt is liable to a personal judgment; and parol evidence is admissible to prove his agreement to assume the debt.[2]

At any time prior to the sale, a person having a lien subsequent to the mortgage is entitled to an assignment of all the interest of the holder of the mortgage on paying him the amount secured, with interest and costs, together with the amount of any other liens of the same holder which are paramount to his. The holder of the note and mortgage may bring a suit at law upon the note, and a suit in equity to foreclose the mortgage, but must elect upon which he will proceed. So far as practicable, the property sold must be sufficient only to satisfy the mortgage.

A bond or an agreement to convey may be treated as a mortgage and foreclosed in the same manner.[3]

A foreclosure sale is subject to redemption in the same manner as a sale under general execution. The owner of the equity may redeem at any time within one year from the day of sale, and in the mean time is entitled to the possession of the property. For the first six months his right to redeem is exclusive; but after that any creditor of his may redeem at any time within nine months from the sale. Creditors may redeem from each other within such time. The terms of redemption are the reimbursement of the amount paid by the person who then holds under the sale, together with the amount of his own lien, with interest at the rate of ten per cent. per annum, together with costs. When redemption is made from a mortgagee whose debt is not due, he must rebate interest at the same rate. After the expiration of nine months, creditors can no longer redeem from each other, but the owner of the equity may still redeem at any time before the end of the year. If the property is finally held by a redeeming creditor, his lien, and the claim out of which it arose, will be held to be extinguished unless within ten days after the nine months limited he enters on the sale book the utmost

[1] Carleton *v.* Byington, 24 Iowa, 172.

[2] Brown *v.* Kurtz, 37 Iowa, 239.

[3] Code, § 3329. But the vendor may at his election recover the purchase money at law. Hershey *v.* Hershey, 18 Iowa, 24; Hartman *v.* Clarke, 11 Iowa, 511. See, also, Blair *v.* Marsh, 8 Iowa, 144; Page *v.* Cole, 6 Iowa, 153; Mullin *v.* Bloomer, 11 Iowa, 360; Guest *v.* Byington, 14 Iowa, 30; Arms *v.* Stockton, 12 Iowa, 327; Wall *v.* Ambler, 11 Iowa, 274.

amount he is willing to credit on his claim. The mode of making redemption is by paying the money into the clerk's office for the use of the persons entitled to it. At the end of the year the sheriff makes the deed to the person entitled to it. In the mean time the mortgagor is entitled to possession.[1]

1336. **Kansas.**[2] — Foreclosure is by an equitable action under the Code. The action is a local one and must be brought in the county in which the land is situated.[3] An attachment of other property may be made in the foreclosure suit as in other actions for the recovery of money, upon an affidavit setting forth sufficient grounds, among which is the insufficiency of the security.[4]

In actions to enforce a mortgage deed of trust, or other lien or charge, a personal judgment is rendered, as well to the plaintiff as other parties having liens, for the amount due with interest, and for the sale of the property and application of the proceeds.[5] There can be no sale of the real estate mortgaged, except in pursuance of a judgment of a court of competent jurisdiction ordering such sale.[6] The suit is always for the debt, whether the plaintiff asks to have the mortgaged property applied in payment of it or not; and the judgment is always a personal judgment for the debt, whether an order is obtained to have the property sold to satisfy the debt or not.[7] A judgment requiring the defendant to pay the debt and costs within one day after its rendition, and requiring the clerk on default to issue a special execution to sell the real estate to satisfy the judgment, is not erroneous because no more time is allowed him to pay the money before the issuing of the special execution.[8]

1337. **Kentucky.**[9] — Foreclosure is made under the jurisdiction of a court of equity. The bill may be brought in any county

[1] Code, 1873, § 3321 and §§ 3101–3129.

[2] Dassler's Stat. 1876, c. 80, §§ 46, 399.

[3] Shields *v.* Miller, 9 Kans. 397; App *v.* Bridge, McCahon, 118.

[4] Shedd *v.* McConnell, 18 Kans. 594.

[5] Gen. Stat. 1868, p. 705; Dassler's Stat. 1876, c. 80, § 3629. As mortgages can be foreclosed by suit only, power of sale mortgages and trust deeds are of no practical advantage.

[6] There is no redemption. The sale cuts off all right. Kirby *v.* Childs, 10 Kans. 639.

[7] Lichty *v.* McMartin, 11 Kans. 565; Jenness *v.* Cutler, 12 Kans. 510; Gillespie *v.* Lovell, 7 Kans. 423.

[8] Blandin *v.* Wade, 20 Kans. 251.

[9] Civil Code, 1876.

Power of sale mortgages and trust deeds must be enforced by a court of equity; but in making sale the court will follow the terms of the power. Campbell *v.* Johnston, 4 Dana, 178.

in which any part of the mortgaged land lies.[1] A sale of the premises, or so much of them as may be necessary, must in all cases be decreed.[2] Before the Code, the court could not decree the payment of any balance found due after the application of the proceeds of sale, if the mortgagee had a legal remedy for obtaining this.[3]

Under the Code foreclosure of a mortgage is forbidden.[4] In an action to enforce a mortgage or lien, judgment may be rendered for the sale of the property and for the recovery of the debt against the defendant personally.[5] A sale of the property may be ordered without giving time to pay money or do other act.[6] Before ordering a sale of real property for the payment of debt, the court must be satisfied by the pleadings, by an agreement of the parties, by affidavits filed, or by a report of a commissioner or commissioners, whether or not the property can be divided without materially impairing its value; and may cause it to be divided, with suitable avenues, streets, lanes, or alleys; or without any of them. If it be necessary to sell, for the payment of debt, a parcel of real property which cannot be divided without materially impairing its value, the officer is required to sell the whole of it, though it bring more than the sum to be raised; and the court shall make proper orders for the distribution of the proceeds. The plaintiff in an action to enforce a lien on real property must state in his petition the liens, if any, which are held thereon by others, and make the holders defendants; and no sale of the property shall be ordered by the court prejudicial to the rights of the holders of any of the liens; and when it appears from the petition or otherwise that several debts are secured by one lien, or by liens of equal rank, and they are all due at the commencement of the action, or become so before judgment, the court shall order the sale for the *pro rata* satisfaction of all of them; but if in such case the debts be owned by different persons and be not all due, the court shall not order a sale of the property until they all mature. If all such liens be held by the same party, the

[1] Caufman *v.* Sayre, 2 B. Mon. 207; Owings *v.* Beall, 3 Litt. 103; Shiveley *v.* Jones, 6 B. Mon. 274.

[2] Formerly, under the general jurisdiction in equity, the court might order a strict foreclosure. See § 1547.

[3] Downing *v.* Palmateer, 1 Mon. 67; Martin *v.* Wade, 5 Mon. 78; Morgan *v.* Wilkins, 6 J. J. Marsh. 28; Crutchfield *v.* Coke, Ib. 90; Martin *v.* Wade, 5 Mon. 79.

[4] Civil Code, § 375.

[5] Civil Code, § 376.

[6] Civil Code, § 374.

court may order a sale of enough of the property to pay the debts then due, unless it appear that it is not susceptible of advantageous division; or that, for some other reason, the sale would cause a sacrifice thereof, or seriously prejudice the interests of the defendants.[1] Every sale made under an order of court must be public, upon reasonable credits to be fixed by the court, not less, however, than six months for real property; and shall be made after such notice of the time, place, and terms of sale as the order may direct; and, unless the order direct otherwise, shall be made at the door of the court-house of the county in which the property, or the greater part thereof, may be situated; and the notice of such sale must state for what sum of money it is to be made.[2] A lien exists on real property sold under an order of court, as security for the purchase money; and, upon payment thereof, the clerk releases the lien on the margin of the record of the deed in the office of the clerk of the county court.[3]

There is no redemption after a sale. Formerly the practice was to render in the first place a decree *nisi* that money be paid by a day certain, usually some day in the succeeding term; and upon failure to pay, a final decree foreclosing absolutely, or directing a sale of the property, was made.[4]

1338. Louisiana. — The civil law system prevails in this state, and as this differs so widely as regards the law of mortgages as well as in other respects from the common law system adopted in the other states, no attempt is made to give any full statement of the law relating to mortgages and the foreclosure of them.[5] In general it may be said that a mortgage executed according to the law of this state is an authentic act before a notary public, and imports a confession of judgment. After the debt is due, the mortgage is foreclosed by instituting a regular suit and obtaining judgment thereon; or upon confession of judgment the court may order the sheriff to proceed at once to seize and sell the mortgaged property.[6] The hypothecary action by which mort-

[1] Civil Code, § 694.

[2] Civil Code, § 696.

[3] Civil Code, § 699.

[4] Downing *v.* Palmateer, 1 Mon. 66; Martin *v.* Wade, 5 Mon. 80; Hanks *v.* Greenwade, 5 J. J. Marsh. 250.

[5] As to rights of second mortgagee in the surplus, see Quertier *v.* Hille, 18 La. Ann. 65. This is a statutory remedy, but does not oust the equitable jurisdiction of the United States courts to enforce the mortgage. Benjamin *v.* Cavarac, 2 Woods, 168.

[6] Boguille *v.* Faille, 1 La. Ann. 204; and see Story's Eq. § 1007.

gages are foreclosed is a real action, or a proceeding *in rem*, whereby the property is followed wherever it may be found. It may be instituted before a court of ordinary jurisdiction. Thirty days' notice to the debtor must be given as a prerequisite to the bringing of the action.[1] If the property does not sell for enough to satisfy the mortgage, the mortgagee becomes an ordinary creditor for the balance.[2]

1339. Maine. — A bill in equity cannot be sustained to fore close a mortgage. The modes provided by statute must be pur sued. These are by entry and possession, by advertisement, and by writ of entry.[3]

The mortgagor or any person claiming under him may redeem at any time within three years after the mortgagee has obtained possession by entry, or by action, or after the first publication of notice, or the service of it, as provided in that mode of foreclosure; but when the mortgagor and mortgagee have in the mortgage agreed upon a less time, but not less than one year, in which the mortgage shall be foreclosed, redemption must be had accordingly.[4] Such redemption applies to each and all the modes prescribed by statute for the foreclosure of mortgages of real estate.[5] After payment or tender of the amount due on the mortgage, a bill in equity may be maintained for redemption and to compel the mortgagee to release his right. When the bill is founded on a tender made before the commencement of the suit, it must be commenced within one year after the tender.[6]

1340. Maryland.[7] — Mortgages are foreclosed by suit in chancery, in which there may be a decree that unless the debt and costs are paid by the time fixed by the decree there shall be a

[1] Gentis *v.* Blasco, 15 La. Ann. 104; Taylor *v.* Pearce, Ib. 564.

[2] Salzman *v.* His Creditors, 2 Rob. (La.) 241. In order to make a valid sale of land under a foreclosure of a mortgage, it is indispensably necessary that in all parishes, except Jefferson and Orleans, there should be an actual seizure of the land; not perhaps an actual turning out of the party in possession, but some taking possession of it by the sheriff not merely constructively. Watson *v.* Bondurant, 21 Wall. 123. As to where the sale should take place, see Walker *v.* Villavaso, 26 La. Ann. 42. As to the disposition of the surplus, see Quertier *v.* Hille, 18 La. Ann. 65; Lacoste *v.* West, 19 La. Ann. 446.

[3] Ireland *v.* Abbott, 24 Me. 155; Shaw *v.* Gray, 23 Me. 174; Chase *v.* Palmer, 25 Me. 341. See §§ **1238–9, 1277.**

[4] R. S. 1857, c. 90, § 6; Act 1872, c. 37.

[5] Laws, 1876, c. 113.

[6] For proceedings to redeem, see Rev. Stat. 1857, c. 90, §§ 13–20; and Act, 1872, c. 41; Acts, 1874, c. 243.

[7] Code, 1860, p. 98, art. 16, § 125.

sale of the property, or of so much of it as may be necessary.[1] This, however, is merely a cumulative remedy, and does not do away with a strict foreclosure. The heirs of the mortgagee need not be made parties to the bill, but any decree upon a bill filed by the executor or administrator of the mortgagee has the same effect as if his heirs were parties to it.[2] When a sale is made, no credit is given except with the consent of the complainant. The sale is made in the county or city where the premises are situated; but if situated in more than one county, the sale may be made in either.[3] If the property sells for less than the amount of the debt, no decree can be made for the balance of the debt, but an action at law may be had to recover such balance.[4] There is no redemption.

If the mortgage is payable by instalments, a sale will be decreed of so much of the property as will pay the amount due, and the decree will stand as security for other instalments as they fall due; and if it cannot be sold in parcels, the court may order it sold entire, and the whole debt paid, with a rebate of interest for sums not due.[5]

1341. Massachusetts. — Foreclosure in equity is very rare, although jurisdiction of the subject is given by statute in cases where there is not a plain, adequate, and complete remedy at common law.[6] Mortgages are generally foreclosed by entry and possession, or by writ of entry, or under powers of sale contained in the mortgages.

Redemption[7] may be had at any time within three years after the mortgagee has obtained possession for the purpose of foreclosure. If a tender be made of the whole sum due on the mortgage within the three years limited for redemption, and it be not accepted, a suit in equity for redemption may be brought within one year after the tender is made. If in such suit the plaintiff alleges a tender, he must when he commences his suit pay the sum

[1] This provision, that the court may decree a sale unless the debt be paid by a day fixed in the decree, may be waived by the mortgagor in his answer, or by previous assent in the mortgage itself; as by a stipulation that upon any default the mortgagee "may forthwith foreclose this mortgage and sell the property." Dorsey *v.* Dorsey, 30 Md. 522.

[2] Code, 1860, p. 94.

[3] Code, 1860, p. 447.

[4] Ing *v.* Cromwell, 4 Md. 31; Eichelberger *v.* Harrison, 3 Md. Ch. 39; Andrews *v.* Scotton, 2 Bland, 667.

[5] Peyton *v.* Ayres, 2 Md. Ch. 64.

[6] G. S. 1860, c. 113, § 2; Shaw *v.* Norfolk Co. R. R. Co. 5 Gray, 162; Lowell *v.* Daniels, 2 Cush. 234.

[7] Gen. Stat. c. 140, §§ 13–35.

thus tendered to the clerk of the court for the use of the party entitled thereto. But he may, at any time within the three years, and either before or after entry for breach of the condition, bring a suit for redemption without a previous tender, and may therein offer to perform the condition of the mortgage. If suit is brought without a previous tender, and it appears that anything is due on the mortgage, the plaintiff must pay the costs, unless the mortgagee has unreasonably refused or neglected when requested to render a just and true account of the money due on the mortgage, and of the rents and profits and sums paid for taxes, repairs, and improvements; or unless he has prevented the plaintiff from performing or tendering performance of the condition. If the tender be insufficient, the plaintiff is nevertheless entitled to redemption if the suit has been commenced within the three years. If too much be tendered, the surplus is restored to the plaintiff. If it appears that the mortgagee has received from the rents and profits or otherwise more than is due on the mortgage, judgment and execution are awarded against him for the sum due the plaintiff.

1342. Michigan.[1] — Bills for foreclosure are filed in the circuit court in chancery of the county where the premises, or any part of them, are situated. The court has power to decree a sale of the mortgaged premises, or such part of them as may be sufficient to discharge the amount due on the mortgage, and the costs of suit; but no lands are to be sold within one year after the filing of the bill of foreclosure.[2] The court may compel the delivery of the possession of the premises to the purchaser, and on the coming in of the report of sale may decree the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the premises, in the cases in which such balance is recoverable at law; and for that purpose may issue the necessary executions as in other cases against other property of the mortgagor.

No proceedings at law for the recovery of the debt can be had while the bill is pending, unless authorized by the court. If the debt be secured by the obligation or other evidence of debt of any person besides the mortgagor, the complainant may make such

[1] Compiled Laws, 1871, pp. 1549–1552.

[2] The purpose of this provision being to give the mortgagor time to make payment and save the lands, that purpose is not served by allowing a sale within six months after he first has notice that a bill has been filed, even though it has been on file for six months previous. The court may postpone the sale until the expiration of a year from service of the subpœna. Detroit F. & M. Ins. Co. *v.* Renz, 33 Mich. 298.

person a party to the bill, and the court may decree payment of the balance of the debt unsatisfied after a sale of the premises, as well against such other person as against the mortgagor. Upon the filing of the bill, the complainant must state in it whether any proceedings have been had at law for the recovery of the debt, or any part of it, and whether any part of it has been paid. If any judgment has been obtained at law, no proceedings can be had, unless return is made that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy the execution except the mortgaged premises.[1]

All sales are made by a circuit court commissioner of the county in which the decree was rendered, or the land or some part of it is situated, or by some other person authorized by the order of the court. The sales are at public vendue between the hour of nine o'clock in the morning and the setting of the sun, at the court-house or place of holding the circuit court in the county in which the estate or some part of it is situated, or at such other place as the court may direct. Deeds are executed by the commissioner, or other person making the sale, specifying the names of the parties to the suit, the date of the mortgage, when and where recorded, with a description of the premises sold, and the amount bid for the same, which vest in the purchaser the same estate that would have vested in the mortgagee if the equity of redemption had been foreclosed, and no other or greater; and the deeds are as valid as if executed by the mortgagor and mortgagee, and are an entire bar against each of them, and against all parties to the suit in which the decree was made, and against their heirs and all persons claiming under them.

The proceeds of a sale under the decree are applied to the discharge of the debt adjudged by the court to be due, and of the costs awarded; any surplus there may be is brought into court for the use of the defendant, or of the person entitled to it, subject to the order of the court. If this remains for three months without being applied for, the court may direct it to be put out at interest, under the direction of the court, for the benefit of the defendant. Where a portion of the mortgage debt is not due at

[1] A bill cannot be maintained which shows that a judgment has been recovered on one of the notes, and that it was nearly paid, but did not show that an execution had been issued and returned unsatisfied in whole or in part, and did not waive a decree as to that note. Dennis *v.* Hemingway, Walker's Ch. 387.

the time of the filing of the bill, it is dismissed upon the defendant's bringing into court, at any time before the decree of sale, the principal and interest due, with costs.[1] If he bring this in after a decree of sale has been entered the proceedings are stayed; but the court enters a decree of foreclosure and sale, to be enforced by a further order of court upon a subsequent default.[2]

The court may direct a reference to a master, to ascertain and report the situation of the premises, or may determine the same on oral or other testimony; and if it appear that they can be sold in parcels without injury, the decree directs so much of the premises to be sold as will be sufficient to pay the amount then due on the mortgage, with costs; and such decree remains as security for any subsequent default. If there be any default subsequent to the decree, the court may, upon the petition of the complainant, by further order direct a sale of so much of the premises as will be sufficient to satisfy the amount due, with the costs of the petition; and such proceedings may be had as often as a default may happen. If it appear that a sale of the whole of the premises will be more beneficial to the parties, the decree in the first instance is entered for the sale of the whole. Upon a sale of the whole, the proceeds are applied as well to the portion of the debt due as towards that not due, with a rebate of legal interest in case the residue do not bear interest; or the court may direct the balance of the proceeds of such sale, after the payment of the portion due, to be put out at interest for the benefit of the complainant, to be paid him as the instalments may become due, and the surplus for the benefit of the defendant, to be paid on the order of the court.

1343. Minnesota.[3] — Actions for the foreclosure of mortgages are governed by the rules and provisions of statute applicable to civil actions. Service by publication for six weeks, as in the case of a sale under power, may be made upon all parties to the action against whom no personal judgment is sought, and such judgment may be taken at the expiration of twenty days after the completion of publication. Such judgment is entered for the amount due with costs, and directs the sheriff to proceed to sell the same

[1] Brown *v.* Thompson, 29 Mich. 72.

[2] The proceedings for a further decree are essentially a new suit in all respects except form; and notice must be given to all persons whose interests will be affected in the same manner as in the original suit. No decree can be entered without proof, as in other cases. Brown *v.* Thompson, 29 Mich. 72.

[3] Stat. at Large, 1873, p. 905.

as on execution and make report to the court. Upon the coming in of the report the court may confirm the sale, and the clerk shall then enter satisfaction of the judgment to the extent of the sum bid, less expenses and costs, and execution may issue for the balance. Redemption may be made as in case of sales under a power; that is for one year.[1] After the expiration of the time allowed for redemption, a final decree is entered that the title is in the purchaser free of all redemption, and this decree being recorded passes the title to the property as against the parties. Any surplus is subject to the order of the court for the benefit of the person entitled to it. When the action of foreclosure is for an instalment due, it may be dismissed on payment before judgment of the amount due; or after judgment, proceedings may be stayed, to be enforced by further order upon subsequent default.

A strict foreclosure may be decreed in cases where such remedy is just or appropriate; but in such case no final decree can be rendered until the lapse of one year after the judgment determining the amount due on the mortgage.[2]

1344. Mississippi.[3] — Foreclosure is under the jurisdiction of courts of equity. Reference is made to the clerk of court or to a master, to compute and report the amount due on the mortgage.[4] The bill may be maintained for an instalment of the mortgage debt before the balance of it becomes due; but the whole debt may be included in the decree if it becomes due before the final hearing.[5] The decree may direct the sale of all the mortgaged property, or of so much of it as may be necessary to pay the debt and costs. There is no redemption after sale.

1345. Missouri.[6] — Foreclosure is by petition in the circuit

[1] See § 1743 for provisions respecting certificate of sale and mode of redemption. See, also, Laws, 1876, c. 38.

[2] Laws, 1870, c. 58; Wilder *v.* Haughey, 21 Minn. 101, per Berry, J.: "The cases are very rare in which a strict foreclosure should be adjudged."

[3] R. C. 1871, § 974.

[4] R. C. 1857, p. 547, art. 48; Beville *v.* McIntosh, 41 Miss. 516.

[5] Magruder *v.* Eggleston, 41 Miss. 284. See provisions as to sales, §§ 846–854, Rev. Code, 1871.

[6] Wagner's Stat. 1872, pp. 953–957.

This is a statutory proceeding, and is governed by the rules of proceedings at law and not by those in equity. Thayer *v.* Campbell, 9 Mo. 277. These statutory provisions are very similar to those of other states which are there enforced in equity.

The courts in this state have sometimes found it a matter of uncertainty whether a foreclosure suit in a particular instance is under the statute, or under the jurisdiction of a court of equity, it being the general opinion that notwithstanding the statutory remedy, a party may pursue his rights in a court of chancery. Although a petition was addressed to the judge "in

court against the mortgagor and the actual tenants or occupiers of the real estate, setting forth the substance of the mortgage deed, and praying that judgment may be rendered for the debt or damages, and that the equity of redemption may be foreclosed, and the property sold to satisfy the amount due. The petition may be filed in any county where any part of the mortgaged premises is situated. In case of the death of the mortgagee or his assignee, or of the mortgagor, either before or after the action is brought, the personal representatives of the deceased must be made a party to the suit; and when the personal representative of the mortgagor is made a party to the suit, and the property is insufficient to satisfy the debt and costs, as to the residue the judgment has the effect of a judgment against the executor or administrator as such.[1] Any person claiming an interest in the mortgaged property may, on motion, be made defendant in such proceedings.[2] When the mortgagor is not summoned, but notified by publication, and has not appeared, the judgment against him is for the debt and damages, or damages found to be due, and costs, to be levied of the mortgaged property, described as in the mortgage.

chancery sitting," and contained language peculiar to bills in equity, yet the mode of proceeding having been that prescribed by the statute, it was regarded as a statutory proceeding. The chief distinction between the two modes is this, that in equity there can be no judgment for a deficiency, while this is provided for by the statute. Riley *v.* McCord, 24 Mo. 265; Fithian *v.* Monks, 43 Mo. 502.

A judgment for the residue of the debt not satisfied by the mortgage can be rendered only against the mortgagor or his personal representative; and cannot be rendered against a purchaser who has assumed the payment of the mortgage as a part of the consideration of purchase. This proceeding being purely statutory cannot be extended beyond the express provisions of the statute. Fithian *v.* Monks, 43 Mo. 502.

In some cases a foreclosure may be had in equity when no remedy can be had under the statute, as in case of a deed made by mistake to the grantor himself, to be void upon the payment of a debt by him; it cannot be treated as a mortgage in a court of law, but in equity may be reformed and foreclosed upon the same bill. Rackliffe *v.* Seal, 36 Mo. 317. And so also on a bill in equity to redeem, the decree may be that on failure to redeem within the time limited the property shall be sold, this being in such case a foreclosure in equity. Davis *v.* Holmes, 55 Mo. 349.

The more common form of security in this state is a trust deed or a power of sale mortgage. These may be foreclosed under the statute, as well as under the powers in these instruments.

[1] Perkins *v.* Woods, 27 Mo. 547. His heirs are not necessary parties.

[2] They are allowed to become parties so that they may protect their own interests, not the interests of others. Wall *v.* Nay, 30 Mo. 494. One of several mortgagees may proceed to foreclose without making the other mortgagees parties to the petition. He has no right to join them, but they may come in voluntarily. Thayer *v.* Campbell, 9 Mo. 277.

When he has been duly summoned, or appears in the suit, the judgment further provides that if the mortgaged property be not sufficient to satisfy the debt and damages, or damages and costs, then the residue shall be levied of other goods, chattels, lands, and tenements of the mortgagor.

The execution is a special *fieri facias*, and is served and returned as executions in ordinary civil suits. The purchaser at a foreclosure sale takes a title against the parties to the suit, but he cannot set it up against the subsisting equities of those who are not parties.

If redemption be made before sale, the officer makes a certificate which is acknowledged and recorded in the office where the mortgage is recorded, and has the same effect as satisfaction entered on the margin. There is no redemption after sale.[1]

1346. Montana Territory.[2] — An action for the foreclosure of a mortgage of real property must be tried in the county in which the subject of the action or some part of it lies. There is but one action for the recovery of any debt, or the enforcement of any rights secured by mortgage upon real estate. In actions for the foreclosure of mortgages the court has the power by its judgment to direct a sale of the incumbered property, or as much as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court, and expenses of the sale, and the amount due the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment is docketed for such balance against the defendant personally liable for the debt, and thus becomes a lien on the real estate of such judgment debtor. Any party not appearing on record need not be made a party to the suit. If there be a surplus, it is paid to the person entitled to it, and in the mean time it is to be deposited in court. If the debt be not all due, sufficient of the property is sold to satisfy the amount due, interest, and costs, and the court may on motion order a further sale. But if the property cannot be sold in portions without injury, the whole may be sold, and the entire debt with interest and costs paid, there being a proper rebate of interest when the part not due does not bear interest.

[1] See Wagner's Statutes, 1872, pp. 609, 614, §§ 42–65, for provisions as to sales. Except as in § 1745.

[2] Codified Stat. 1872, p. 92; Code of Civ. Proced. 1877, §§ 56, 346–348.

1347. Nebraska.[1] — On petition for foreclosure the court in chancery may decree that the premises be sold, and upon the coming in of the report of sale, that the mortgagor pay any balance of the debt that may remain after the sale, and execution may issue against other property of the mortgagor. Other persons liable for the mortgage debt may be made parties, and the court may render judgment against them for any balance of the debt remaining unsatisfied. After the filing of the petition no proceedings at law for the recovery of the debt shall be had unless authorized by the court. If there has already been a suit at law, there must be a return by the proper officer that the defendant has no property whereof to satisfy such execution except the mortgaged premises.[2]

A sale under a decree in chancery must be made by a sheriff, or some other person authorized by the court in the county where the premises or some part of them are situated. A sheriff making the sale acts in his official capacity and is liable on his bonds for his acts. The deed executed in pursuance of the sale is an entire bar against both the mortgagor and mortgagee, and all parties to the suit and their heirs. Any surplus is subject to the order of court for three months.

When a petition is filed for the payment of interest, or any instalment of the principal before the whole is due, the petition is dismissed upon the defendant's bringing into court the amount due and costs, at any time before decree of sale; and after such decree, upon payment of the amount due, the proceedings are stayed; but may be enforced by further order upon any subsequent default occurring. If in such case payment is not made, the court directs the sale of so much of the mortgaged premises as will be sufficient to pay the amount then due, and the decree remains a security for any subsequent default, when a further sale

[1] G. S. 1873, pp. 655–658. Laws, 1875, p. 42.

The proceedings are governed by the statute. All persons having an interest in the premises not adverse to the mortgagor are necessary parties to the suit, in order that a perfect title may pass by a sale under the decree. On the hearing the court finds the amount due on the note and mortgage, or in case of two or more mortgages, the amount due on each, and the priority of liens, and renders a decree of foreclosure and sale, the proceeds of the sale to be applied in the order of such priority. Tootle *v.* White, 4 Neb. 401.

[2] The petition must show whether there has been a suit at law and whether any part of the debt has been collected. Simmons Hardware Co. *v.* Brokaw, 7 Neb. 405.

may be ordered. If a sale of the whole of the mortgaged premises will be most beneficial to the parties, the decree directs the sale of the whole in the first instance; and in this case the proceeds are applied to the payment of the whole mortgage debt, with a proper rebate of interest if the balance not due does not bear interest. The decree operates directly upon the mortgaged property; no order of sale need be issued.[1] There is no redemption after sale.

1348. Nevada.[2] — Only one action can be had for the recovery of the debt or enforcement of the mortgage.[3] In such action judgment is rendered for the amount found due, and for a sale of the property, and application of the proceeds to payment of the debt; execution may issue for any balance there may appear to be due by the sheriff's return. Any surplus the court may cause to be paid to the persons entitled to it, and in the mean time may direct it to be deposited in court. If the debt be not all due only so much of the property as is necessary to satisfy the amount due shall be sold; but if it cannot be sold in portions without injury, the whole may be ordered to be sold in the first instance, and the entire debt paid with a proper rebate of interest.

A certificate of the sale is made by the sheriff, and after the time allowed for redemption has expired, a deed is executed. The debtor, or his successor in interest, may redeem within six months, on paying the amount of the bid in the money or currency specified in the judgment, with eighteen per cent. thereon in addition, with any amount paid for taxes; and also, if the purchaser be a creditor having a lien prior to that of a redemptioner other than the judgment under which the purchase was made, the amount of such lien, with interest. There may be successive redemptions by judgment or mortgage creditors within sixty days after the last redemption.[4]

The statute in this state entirely changes the common law rule that the mortgagee may pursue all his remedies simultaneously, by action upon the debt, by bill to foreclose, and ejectment. Here ejectment is wholly forbidden. No action of debt can be resorted to unless the mortgage lien be abandoned. The remedy

[1] Rector *v.* Rotton, 3 Neb. 171.

[2] Compiled Laws, 1873, vol. 1, p. 367, §§ 1309–1311.

[3] It would seem that this provision would not prevent a sale under a power. Bryant *v.* Carson River Lumbering Co. 3 Nev. 313.

[4] Compiled Laws, 1873, §§ 1292–1295.

against the property is confined to foreclosure and sale.[1] A judgment for the debt cannot be enforced until the remedy against the property is exhausted. The plaintiff may if he choose take simply a decree in equity, without a common law judgment, and then if the property falls short of paying the entire debt he may afterwards have execution for the balance. If a common law judgment be taken in the first instance, it constitutes no lien upon other property until a deficiency is duly ascertained and docketed.[2] Equity has jurisdiction of a bill to foreclose, although the debt has been presented and allowed against the estate of the deceased mortgagor.[3]

1349. New Hampshire. — Foreclosure may be had by bill in equity when the complicated relations of the parties render proceedings at law inadequate.[4] The modes of foreclosure in common use are by entry under process of law; by peaceable entry and publication of notice of the same; or by advertisement when the mortgagee is already in possession. In either case actual peaceable possession continued for one year from the time of entry, or from the day specified in the notice in the latter mode, forever bars the right of redemption.[5]

1350. New Jersey. — Foreclosure is under the general jurisdiction of the courts of chancery; but where all the premises are situate in the same county, the circuit court of the county has the same jurisdiction and power as the court of chancery.[6] The court may decree a sale of the mortgaged premises, or of such part of them as shall be sufficient to discharge the debt and costs; which sale shall be made either by one of the masters of the court or by the sheriff of the county where the premises are situated by virtue of a writ of *fieri facias*. The officer making the sale executes the proper deed. An absent defendant may at any time before the sale cause his appearance to be entered, and upon the payment of costs the proceedings may be stayed, and may afterwards go on as if his appearance had been duly entered in the beginning. When a decree is had for the non-payment of an instalment of

[1] Hyman *v.* Kelly, 1 Nev. 179.

[2] Weil *v.* Howard, 4 Nev. 384.

[3] Corbett *v.* Rice, 2 Nev. 330.

[4] Aiken *v.* Gale, 37 N. H. 510.

[5] G. S. 1867, c. 122; G. L. 1878, c. 136, §§ 14–16. See §§ **1241–1243**.

[6] Nixon's Dig. 1868, pp. 608, 612; Rev. 1877, p. 705. In an action of ejectment for the recovery of mortgaged lands, and in actions upon the bond, a tender of the sum due with costs is a satisfaction of the mortgage, and the mortgagee may thereupon be compelled to reconvey. Rev. 1877, pp. 701, 702.

interest or principal, before the whole mortgage debt is due, and it shall appear to the court that a part of the mortgaged premises cannot be sold to satisfy the amount without material injury to the remaining part, and that it is just and reasonable that the whole should be sold together, the court may decree a sale of the whole, and apply the proceeds of the sale, or so much as may be necessary, as well to the payment of the amount then due as to the payment of the whole or residue of the debt, making a proper rebate of interest upon the part of the debt not then due and payable. When the defendant has entered an appearance but has filed no answer, execution for sale is not issued until the expiration of such time as may be fixed by the rules of the court, not less than two, nor more than four months.[1] If the mortgagor or any of those holding under him has absconded, or is unknown to the holder of the mortgage, service may be made by publication.[2] The chancellor may decree the payment of any excess of the mortgage debt above the proceeds of sale, by any of the parties to the suit who may be liable for it either at law or in equity.[3] The practice in such cases is to issue an order after sale, reciting the proceedings under the execution, and the existence and amount of the deficiency as ascertained by the statement of the officer by whom the decree of sale was executed, and to award an execution to make the amount with interest and costs of the order and execution.[4]

When a foreclosure is sought for an instalment only of the debt, the remainder not being due, the court will not direct the whole premises to be sold, if they can be divided; and if a decree has been entered for the sale of the whole premises when they are manifestly divisible, the court may in its discretion regulate the execution of the decree.[5]

When no one is necessarily interested in the mortgaged premises other than the mortgagor and mortgagee, and the premises are subject to one mortgage only, foreclosure may be had by *scire facias* in the Supreme Court or court of common pleas of the county where the lands lie.[6] Under this process, after judgment,

[1] Rev. 1877, pp. 116–118, §§ 71–77.

[2] Laws, 1873, p. 161; Rev. 1877, p. 704.

[3] Nixon's Dig. 1868, p. 119; Act of March 29, 1866; Rev. 1877, p. 118 § 76.

[4] Mut. Life Ins. Co. *v.* Southard, 25 N. J. Eq. 337.

[5] Am. Life & Fire Ins. & Trust Co. *v.* Ryerson, 6 N. J. Eq. (2 Halst.) 9.

[6] Nixon's Dig. 1868, p. 609; Rev. 1877, p. 703.

the premises are sold in the same manner as under other executions for the sale of real estate, and conveyed to the purchaser.[1] If there is any surplus after paying the mortgage debt, it is paid into court by the sheriff or other officer making the sale; and the court orders it to be applied in satisfaction of any judgment or other lien upon the property, if there be any, but otherwise to be paid by the debtor.

There is no redemption after sale.

1351. New York.[2] — On a bill in equity for the foreclosure of a mortgage, the court decrees a sale of the property, or such part of it as may be sufficient to discharge the debt and costs of suit. The court may compel a delivery of the possession of the premises to the purchaser; and on the coming in of the report of sale, the court may decree the payment, by the mortgagor, of any balance of the mortgage debt that may remain unsatisfied after a sale of the premises, in cases in which such balance is recoverable at law;[3] and for that purpose may issue the necessary executions against other property of the mortgagor, or against his person. After the bill is filed, and while it is pending, and after a decree is rendered, no proceedings can be had at law for the recovery of the debt, unless authorized by the Court of Chancery.[4] Any other person besides the mortgagor, who is under obligation to pay the debt, may be made a party to the bill, and the court may decree payment of the debt remaining unsatisfied, as well against him as against the mortgagor. Upon the filing of the bill, the complainant must state whether any proceedings at law have been had; and if it appear that a judgment has been obtained in a suit at law no proceedings can be had unless the sheriff has returned the execution unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy it, except the mortgaged premises.[5]

[1] As to advertising and adjourning the sale, see Nixon's Dig. 1868, p. 866; Hewitt *v.* Montclair R. R. Co. 25 N. J. Eq. 392.

[2] 3 R. S. 1875, pp. 198–200; Fay's Dig. of Laws, 1876, vol. 3, pp. 406–408.

[3] A contingent decree for the payment of any deficiency may be made before sale. McCarthy *v.* Graham, 8 Paige, 480.

The master's deed passes the title from the time of its delivery. Fuller *v.* Van Geesen, 4 Hill, 171.

[4] A suit at law need not be actually discontinued before filing the bill; but upon the filing of it the suit is suspended. Williamson *v.* Champlin, 8 Paige, 70.

[5] This prohibition is not limited to a suit against the mortgagor, but applies to a suit against a surety or one who has assumed to pay the mortgage. Pattison *v.* Powers, 4 Paige, 549. If the plaintiff untruly aver that no proceedings have been had, the defendant may plead a judgment

Sales are made by the sheriff of the county where the premises or some part of them are situated, unless otherwise ordered in the decree.[1] Deeds are executed by the sheriff which vest in the purchaser the estate that would have vested in the mortgagee if the equity of redemption had been foreclosed.[2] Any surplus after discharging the debt is brought into court for the use of the defendant, or of the person entitled to it.[3] If not applied for within three months, the courts direct it to be put at interest for the benefit of those interested.

When a bill is filed for the foreclosure of a mortgage, upon which some instalments are not due, the bill is dismissed upon the defendant's bringing into court, at any time before the decree of sale, the principal and interest due, with costs; if brought after the decree, the proceedings are stayed; but the court enters a decree of foreclosure and sale, to be enforced by a further order of the court, upon a subsequent default.[4] Where a part only of the debt is due before sale, the court directs a reference to a master, to ascertain and report the situation of the premises;[5] and if it appear that they can be sold in parcels, without injury, the decree directs so much to be sold as will be sufficient to pay

at law without averring that no execution has been issued on it. North River Bank *v.* Rogers, 8 Paige, 648. See, also, as to the effect of a judgment, Grosvenor *v.* Day, Clarke Ch. 109.

The mere commencement of proceedings at law, if no judgment has been recovered, will not prevent the filing of a bill to foreclose. But the suit cannot be prosecuted without the permission of court. This may be given in some cases, as, for instance, where the suit is against a third person liable for the debt, but who is not a party to the bill of foreclosure, and might not be liable to a decree for the deficiency if he were a party, and where the premises are not sufficient to pay the debt. The court will permit the suit at law to proceed so far as to test the validity of a defence set up, but will not allow an execution to be taken out on the judgment without further order of court. Suydam *v.* Bartle, 9 Paige, 294. See, also, Thomas *v.* Brown, Ib. 370; Engle *v.* Underhill, 3 Edw. Ch. 249.

[1] If the sale be made by a referee appointed for the purpose, his duties are ministerial in their nature, and he must follow the terms of sale, and is personally liable if he disregards them. Day *v.* Bergen, 53 N. Y. 404.

[2] When the sale is made by a master, no report or confirmation is necessary before making the deed. Monell *v.* Lawrence, 12 Johns. 521.

[3] Bostwick *v.* Pulver, 3 How. Pr. 69.

[4] See, also, Brinkerhoff *v.* Thallhimer, 2 Johns. (N. Y.) Ch. 486; Ellis *v.* Craig, 7 Ib. 7.

[5] An order of sale will not be made without reference. Ontario Bank *v.* Strong, 2 Paige, 301.

If the master has reported that the premises cannot be sold in parcels, on another instalment becoming due a second reference is not necessary. Knapp *v.* Burnham, 11 Paige, 330.

the debt and costs;[1] and the decree remains as security for any subsequent default.[2]

If it appears that a sale of the whole will be most beneficial to the parties, the decree is entered in the first instance for the sale of the whole accordingly.[3] In such case the proceeds are applied to the payment of the whole debt secured whether due or not, with a proper rebate of interest if the part not due does not bear interest; or the court may direct the balance, after paying the amount due, to be put at interest for the benefit of the complainant, to be paid when the balance shall become due, and the surplus for the benefit of the defendant, to be paid on the order of the court.

No decree of foreclosure is made unless proof is given that notice of the pendency of the suit has been filed in the office of the county clerk at least twenty days before the decree is made.[4]

1352. North Carolina. — Mortgages are foreclosed by action in the nature of a bill in equity.[5] The suit must be brought in

[1] The master is not bound to sell in parcels unless the decree so directs. Woodhull *v.* Osborne, 2 Edw. Ch. 614; Lansing *v.* Capron, 1 Johns. Ch. 617.

[2] If the mortgage be conditioned for the support of the mortgagee during life, no decree for subsequent breaches can be made without supplementary proceedings. Ferguson *v.* Ferguson, 2 N. Y. 360.

So where interest only is due. Brinkerhoff *v.* Thallhimer, 2 Johns. Ch. 486; Lyman *v.* Sale, Ib. 487; Campbell *v.* Macomb, 4 Johns. Ch. 534; Delabigarre *v.* Bush, 2 Johns. 490; Brevoort *v.* Jackson, 1 Edw. Ch. 447.

[3] A sale of the whole may be decreed when the mortgage is inadequate security, and the mortgagor is irresponsible, although the whole debt be not due, unless the mortgagor will pay the amount due, or give security for the residue. Suffern *v.* Johnson, 1 Paige (N. Y.), 450. The court may order a sale of the whole premises, with a view, not to the satisfaction of the mortgage, but to the better protection of the subsequent parties in interest. Livingston *v.* Mildrum, 19 N. Y. 440, 443; Snyder *v.* Stafford, 11 Paige, 71; Deforest *v.* Farley, 4 Hun (N. Y.), 640.

So when there is a second mortgage on the same premises, which is due, upon the foreclosure of the first mortgage, although a part only of that is due, the court will direct a sale of the whole premises, or so much as will satisfy the whole of both mortgages, unless the defendant pay the amount due with costs before sale. Hall *v.* Bamber, 10 Paige (N. Y.), 296. Although the premises consist of two or more parcels, if they have previously been held, used, and conveyed together as one farm, a sale of the whole in one parcel is good. Anderson *v.* Austin, 34 Barb. 319; and see Wolcott *v.* Schenck, 23 How. Pr. 385; Woodhull *v.* Osborne, 2 Edw. Ch. 615.

[4] R. S. 1875, p. 486; Dig. of Laws, vol. 3, p. 664. A decree without such proof, though irregular, is not void. Potter *v.* Rowland, 8 N. Y. 448; Curtis *v.* Hitchcock, 10 Paige, 399; White *v.* Coulter, 1 Hun (N. Y.), 357.

[5] All distinction between actions at law and suits in equity is abolished. Constition, sec. 1, art. 14; Battle's Revisal (1873), 137.

the county in which the premises or some part of them are situated.[1] If any party having an interest in the mortgaged premises or a lien upon them is unknown to the plaintiff, and his residence cannot with reasonable diligence be ascertained, upon affidavit of such fact the court grants an order that the summons be served by publishing the same for six weeks, once in each week successively, in one newspaper printed in Raleigh, and in one printed in the county where the premises lie.[2] In actions to foreclose mortgages, the court has power to adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the court may adjudge payment of the residue of such debt remaining unsatisfied after the sale against such other person, and may enforce the judgment as in other cases.[3] The premises are sold at the court-house in the county where situated, after advertisement and notice, by the sheriff of the county, or by a referee appointed by the court for the purpose, whose conveyance to the purchaser is effectual to pass the rights and interests of the parties adjudged to be sold.[4] There is no redemption after sale. Under the present Code a judgment may be rendered against any one personally liable for the mortgage debt, for a deficiency after the sale, though this could not be done under the former equity practice.[5]

1353. Ohio.[6]—In the foreclosure of a mortgage a sale of the premises is ordered in all cases. If the mortgage embraces an entire tract of land, or separate tracts situated in two or more counties, the sheriff of each county in which the lands are situated is ordered to make sale of the land situated in the county of

[1] Battle's Revisal, 1873, p. 157.

[2] Ib. p. 162.

[3] Ib. p. 171, § 126.

[4] Ib. 203, 391.

[5] Ib. 200; Fleming *v.* Sitton, 1 Dev. & Bat. Eq. 621.

[6] Sayler's Stat. 1876, p. 2380. See, also, R. S. (Sup. S. & S.) 561; Laws, 1870, p. 114. The distinction between actions at law and suits in equity was abolished in 1853; but the mode of proceeding is in accordance with general equity principles. The former statute remedy by *scire facias* did not preclude foreclosure by bill in equity. Anonymous, 1 Ohio, 235. The system of procedure by *scire facias* was adopted by the territorial government in 1795, from the Statutes of Pennsylvania. Biggerstaff *v.* Loveland, 8 Ohio, 45.

which he is sheriff, unless in the opinion of the court the circumstances of the case, or the interests of the parties, appear to require the sale to be made by a single officer; in which case the court may order the sale to be made by the sheriff of either county in which any part of the mortgaged premises may be situated, or by a master commissioner, and the court may order the lands to be sold entire or in parcels, as the interests of the parties may require; and in such cases the mortgaged premises must be appraised by three disinterested freeholders of either or any of the counties in which the lands may be situated, and notice of the sale given by advertisement in such of said counties as is required in the case of the sale of real estate on execution; and the court may, in the order of sale or on confirmation of the sale, make such order touching the distribution of the proceeds of sale as may be necessary to protect and preserve the relative rights and privileges of all lien holders on such premises, or on the several parcels thereof. Where the lands or any parcels thereof have been twice advertised and offered for sale, and shall remain unsold for want of bidders, the court being satisfied thereof, on motion of the plaintiff or defendant at the time of ordering such new appraisement, may also order that said land be sold on time as follows: one third cash in hand, one third in nine months from the day of sale, and the remaining third in eighteen months from the day of sale, the deferred payments to draw six per cent. interest, and to be secured by mortgage on the premises.[1]

The plaintiff may also ask in his petition for a judgment for the money claimed to be due; and such proceedings shall be had and judgment rendered as in other civil actions for the recovery of money only.[2]

Notice of the sale must be given for at least thirty days before the sale in some newspaper printed and of general circulation in the county; or in case there be none, then in one of general circulation therein and by posting upon the court-house door, and in five other public places in the county, two of which must be in the township where the lands lie. If the newspaper be published

[1] R. S. (Sup. S. & S.) 575.

[2] Laws, 1870, p. 114, § 5. See Keller *v.* Wenzell, 23 Ohio St. 579; Wood *v.* Stanberry, 21 Ohio St. 142; Hamilton *v.* Jefferson, 13 Ohio, 427; Myers *v.* Hewitt, 16 Ohio, 456. There may be judgment against all the makers of the note, although the mortgage is executed by only a part of them. King *v.* Safford, 19 Ohio St. 587.

weekly, the notice must be inserted in five consecutive numbers. Sales made without such advertisement are set aside on motion. A confirmation of the sale is necessary, after which the sheriff or other officer makes a conveyance to the purchaser, which is effectual to pass all the title of the mortgagor at the time of making the mortgage. There is no redemption afterwards.[1]

1354. Oregon.[2] — Mortgages are foreclosed by suit and the property adjudged to be sold. If a promissory note or other personal obligation for the payment of the debt has been given, the court also decrees a recovery of the amount of such debt. Any person having a lien subsequent to the plaintiff upon the same property, and any person who has given a promissory note or other personal obligation for the payment of the debt, must be made a defendant in the suit; and any person having a prior lien may be made defendant at the option of the plaintiff. Any defendant having a lien may have a decree in the same manner as if he were plaintiff.

When a decree is given foreclosing two or more liens upon the same property or any portion thereof in favor of different persons not united in interest, such decree must determine and specify the order of time, according to their priority, in which the debts secured by such liens shall be satisfied out of the proceeds of the sale of the property. The decree may be enforced by execution as an ordinary decree for the recovery of money, except that when a decree of foreclosure and sale is given, an execution may issue thereon against the property adjudged to be sold. If the decree is in favor of the plaintiff only, the execution may issue as in ordinary cases; but if it be in favor of different persons, not united in interest, it shall issue upon the joint request of such persons, or upon the order of the court or judge thereof, on the motion of either of them; when the decree is also against the defendants or any one of them in person, and the proceeds of the sale of the property upon which the lien is foreclosed is not sufficient to satisfy the decree, as to the sum remaining unsatisfied, the decree may be enforced by execution as in ordinary cases. When in such case the decree is in favor of different persons not united in interest, it shall be deemed a separate decree as to such persons, and may be enforced accordingly.

[1] Code of Civil Procedure, 1874, §§ 436–438. See McArthur *v.* Franklin, 16 Ohio St. 193; Carter *v.* Walker, 2 Ohio, St. 339.

[2] Gen. Laws (1872), p. 196.

During the pendency of an action of law for the recovery of a debt secured by any lien, a suit cannot be maintained for the foreclosure of such lien, nor thereafter, unless judgment be given in such action that the plaintiff recover such debt or some part thereof, and an execution thereon against the property of the defendant in the judgment is returned unsatisfied in whole or in part. When a suit is commenced to foreclose a lien by which a debt is secured, which debt is payable in instalments either of interest or principal, and any of such instalments is not then due, the court shall decree a foreclosure of the lien, and may also decree a sale of the property for the satisfaction of the whole of such debt, or so much thereof as may be necessary to satisfy the instalment then due, with costs of suit; and in the latter case the decree of foreclosure as to the remainder of the property may be enforced by an order of sale in whole or in part, whenever default shall be made in the payment of the instalments not then due. If, before a decree is given, the amount then due, with the costs of suit, is brought into court and paid to the clerk, the suit shall be dismissed; and if the same be done after decree and before sale, the effect of the decree as to the amount then due and paid shall be terminated, and the execution, if any have issued, be recalled by the clerk. When an instalment not due is adjudged to be paid, the court shall determine and specify in the decree what sum shall be received in satisfaction thereof, which sum may be equal to such instalment or otherwise, according to the present value thereof.

1355. Pennsylvania. — In the case of mortgages given by corporations the Supreme Court of the commonwealth may exercise all the power and jurisdiction of a court of chancery.[1] There has never been any distinct chancery tribunal in this state, and the chancery powers conferred previous to the above statute never embraced the subject of mortgages; therefore there was no jurisdiction to decree a foreclosure or sale under a mortgage; but as the court had jurisdiction of trusts, it could in behalf of a *cestui que trust* compel trustees under a mortgage with a power of sale to execute the power according to its terms. The court de-

[1] Brightly's Purdon's Dig. 1872, 593; Act of April 11, 1862. This provision is constitutional, as applied to mortgages made before the act was passed. McCurdy's Appeal, 65 Pa. St. 290; McElrath *v.* Pittsburg & Steubenville R. R. Co. 55 Pa. St. 189.

clined, however, to do more than to control or direct the execution of a power of sale already conferred, and would not itself exercise the power.[1] The above provision was accordingly enacted in order that there might be a remedy more adequate for the administration of the large mortgages which corporations are in the habit of making, than was furnished by the writ of *scire facias* by which mortgages are generally foreclosed.

The mode of foreclosing mortgages in other cases is by *scire facias*. When default has been made on a mortgage, the holder of the mortgage, at any time after the expiration of twelve months[2] next ensuing the last day when the mortgage money ought to be paid, or other condition performed, may sue forth a writ of *scire facias*[3] from the court of common pleas for the county or city where the lands lie, directed to the proper officer, requiring him to make known to the mortgagor or his heirs, executors, or administrators, that he show cause why the mortgaged premises should not be seized and taken on execution for payment of the mortgage money, with interest. If the defendant appears, he may plead satisfaction of part or all of the mortgage money, or make any other lawful plea, in avoidance of the deed or debt; but if he do not appear on the day the writ is made returnable, if damages only are recoverable, an inquest is to be forthwith charged to inquire thereof, and judgment is entered that the plaintiff have execution by *levari facias;* by virtue of which the premises are taken in execution and exposed to sale and conveyed to the buyer,

[1] Bradley *v.* Chester Valley R. R. Co. 36 Pa. St. 141; Ashhurst *v.* Montour Iron Co. 35 Pa. St. 30.

[2] Brightly's Dig. 1872, p. 482. This limitation may be waived in the mortgage subsequently. But the waiver must be explicit and by the party authorized to make it; and must be in the mortgage itself and not in the bond. Kennedy *v.* Ross, 25 Pa. St. 356; Huling *v.* Drexell, 7 Watts, 126; Walker *v.* Tracey, 1 Phila. 225; Whitecar *v.* Worrell, 1 Phila. 44; Black *v.* Galway, 24 Pa. St. 18.

[3] The mortgagee cannot proceed by *scire facias* to recover successive instalments of a mortgage debt. This remedy puts an end to the security, and disposes of the whole estate. Fickes *v.* Ersick, 2 Rawle, 166; Ewart *v.* Irwin, 1 Phila. 78. But if the mortgage provides that on a failure to pay any instalment for a certain period the whole debt should become due and collectible, *scire facias* may issue forthwith upon the default for the whole debt. Hosie *v.* Gray, 71 Pa. St. 193. The provisions of a stay law may be waived in the mortgage by express provision. Drexel *v.* Miller, 49 Pa. St. 246. Upon any default ejectment may be maintained for possession of the land. Smith *v.* Shuler, 12 S. & R. 240; Fickes *v.* Ersick, 2 Rawle, 166; Martin *v.* Jackson, 27 Pa. St. 504. But this process only gives possession, which may be maintained until the debt is paid. Colwell *v.* Hamilton, 10 Watts, 417.

and the money rendered to the mortgage creditor; but for want of buyers to be delivered to the creditor, in the same manner as land taken upon execution for other debts. When the lands are sold or delivered they are held discharged of all equity of redemption, and all incumbrances made or suffered by the mortgagor, his heirs or assigns; but before sale is made, notice must be given in writing of the time and place of sale in the same manner as is directed concerning sales upon execution.[1] Any surplus realized above the debt and costs must be returned by the officer to the defendant. On a reversal of the judgment under which a sale has been made, the purchaser is protected in his title, unless the process was void.[2] When an action is brought on a mortgage, a memorandum of the names of the parties and date of the action is furnished to the recorder and entered upon the record of the mortgage. An assignee of the mortgage may sue in his own name or in the name of the mortgagee for the use of the assignee; or the record may be amended after suit has been commenced, and the proper persons made parties. Mortgages of leasehold estates are foreclosed in the same manner.[3]

If the mortgagee has released a portion of the premises, the defendant in *scire facias* may plead that the balance claimed is greater than in a just proportion should be levied on the premises described in the writ.[4] In general as to the defences that may be taken, although the action be one at law, equitable defences are not necessarily excluded.[5] Any defence may be set up in this action that may be set up against the mortgage debt; as that there

[1] This is a proceeding *in rem*. The effect of the sale is to extinguish the equity of redemption and transfer the estate as fully as it existed in the mortgagor before the mortgage. Hartman *v.* Ogborn, 54 Pa. St. 120. The wife's dower is barred though she did not join in the mortgage. Scott *v.* Crosdale, 2 Dall. 127. The sale must be by the sheriff of the county where the land lies. He can sell the thing outside of it. Menges *v.* Oyster, 4 W. & S. 20. As to distribution of surplus, see Selden's Appeal, 74 Pa. St. 323.

[2] See Caldwell *v.* Walters, 18 Pa. St. 84; Evans *v.* Meylert, 19 Pa. St. 402; Wilson *v.* McCullough, 19 Pa. St. 77; Burd *v.* Dansdale, 2 Binn. 80.

[3] Before this statute after an assignment duly executed and recorded, no suit could be maintained in the name of the assignor for the use of those having the equitable interest in the mortgage. Pryor *v.* Wood, 31 Pa. St. 142. If the assignment was not formal and legal, the suit could be maintained by the assignor. Partridge *v.* Partridge, 38 Pa. St. 78; Moore *v.* Harrisburg Bank, 8 Watts, 138, 151.

[4] Dig. of Stat. *supra*, p. 480.

[5] Ewart *v.* Irwin, 1 Phila. 78; S. C. 7 Leg. Int. 134.

was no consideration, or that this was void or illegal,[1] or that the consideration has failed, as in the case of a purchase money mortgage, when the mortgagor has been ejected by reason of a paramount title in another.[2] But a purchaser of several lots of land having secured the unpaid purchase money by a mortgage upon one of the tracts of which he has taken a separate deed, cannot set up as a defence to the mortgage a failure of the title of the lots not included in the mortgage.[3]

This is a local action and must issue in the county where the land lies.[4] It is regarded chiefly as a proceeding *in rem*, to foreclose the mortgage and convert the security into money. It is a proceeding *in personam* only so far as notice to the parties is prescribed by the act.[5] The action is applicable to all mortgages whether recorded or not. It is founded on the instrument itself, and not upon the record of it. The proper plea in denial of the instrument is *non est factum* and not *nul tiel record*. But on the trial an exemplification of the record may be used as evidence of the instrument itself.[6] No one except the mortgagor, or upon

[1] Raguet *v.* Roll, 7 Ohio, 77. In this case the defence was that the consideration was in part for the forbearance of a criminal prosecution.

[2] Morris *v.* Buckley, 11 S. & R. 168. Otherwise in Illinois. McFadden *v.* Fortier, 20 Ill. 509.

[3] Fisk *v.* Duncan, 83 Pa. St. 196.

[4] Tyron, *v.* Munson, 77 Pa. St. 250. When the real estate bound by a mortgage is situate in two or more counties, it is lawful for the mortgagee or his assignee to issue his writ of *scire facias*, to enforce the collection of said mortgage in the courts of either of the said counties where the mortgage may be recorded, and proceed to obtain judgment thereon; provided that the sale made under a writ of *levari facias*, issued on the judgment in the county where the judgment shall have been obtained, shall be sufficient to vest in the purchaser the entire estate of the mortgagor in the premises bound by the mortgage, as well as in the county where the *scire facias* may have been issued as in the other counties where the mortgage may have been recorded; and provided, further, that before sale be made under the writ of *levari facias*, an exemplification of the record of the judgment shall be taken from the county where the same was obtained, and entered in the courts of the other counties where said mortgage may have been recorded; and advertisement of the sale shall be made by the sheriff, in at least one newspaper published in each of the other counties, in addition to the advertisement as now directed by law in the county in which the sale is to be made. The court of the county in which the judgment may be obtained upon any such mortgage as aforesaid may make any order which may appear to them just and equitable, directing the lands to be sold in parcels, as divided by the county lines or otherwise, as may best suit the interest of parties having liens upon the land in the different counties. Purdon's Ann. Dig. p. 2111, §§ 6, 8.

[5] Hartman *v.* Ogborn, 54 Pa. St. 120; Wilson *v.* McCullough, 19 Pa. St. 77; Brown *v.* Scott, 51 Pa. St. 357.

[6] McLaughlin *v.* Ihmsen, 83 Pa. St. 364; Tyron *v.* Munson, 77 Pa. St. 250; Lan-

his death his personal representatives, is a necessary party to the action. A purchaser from the mortgagor or other terre-tenant need not be made a party to the suit; though it is the general practice to give such purchaser or tenant notice of it, and to permit him to make any equitable or legal defence to which he may be entitled,[1] in which case he should be required to give a stipulation for costs, otherwise, the judgment being exclusively *in rem*, he is not personally responsible for them. The writ takes the place of a declaration and should show on its face an immediate cause of action.[2] The judgment cuts off all rights and interests under the mortgage which are not paramount to it, although the parties holding rights subsequent to the mortgage are not made parties to the action, and have no notice of it.[3] The sale under the judgment does not affect prior rights and liens, but is subject to them.[4] The judgment, moreover, extinguishes the debt.[5]

1356. Rhode Island. — There is jurisdiction in equity of the foreclosure of mortgages. The bill should be brought in the supreme court for the county in which the premises are situated. It is heard and determined according to the principles of equity.[6]

The statutory remedies are entry and possession,[7] and actions at law of ejectment, or of trespass and ejectment for obtaining possession.[8] Redemption may be made within three years after possession is acquired in either way.[9]

1357. South Carolina.[10] — Mortgages are foreclosed by ordinary suit of complaint and summons in the nature of a proceeding in equity. The action must be brought in the county where the premises or some part thereof are situated. If any party interested in the lien or in the property is unknown to the plaintiff, and his residence cannot, with reasonable diligence, be ascertained by him, the court upon affidavit of such fact may grant an order

caster *v.* Smith, 67 Pa. St. 427; Roberts *v.* Halstead, 9 Pa. St. 33; Frear *v.* Drinker, 8 Pa. St. 520.

[1] Mevey's Appeal, 4 Pa. St. 80; Hinds *v.* Allen, 34 Conn. 185.

[2] Swift *v.* Allegheny Building Ass. 82 Pa. St. 142.

[3] Dennison *v.* Allen, 4 Ohio, 496.

[4] Wertz's Appeal, 65 Pa. St. 306; Helfrich *v.* Weaver, 61 Pa. St. 385.

[5] Reedy *v.* Burgert, 1 Ohio, 157.

[6] G. S. 1872, c. 166, § 14.

[7] See § **1245**.

[8] See § **1279**.

[9] G. S. 1872, c. 165.

[10] R. S. 1873, pp. 597, 610. All distinction between actions at law and in equity is abolished.

that the summons be served on such party by publishing the same for six weeks, once in each week successively, in a newspaper printed in the county where the premises are situated. The court has power to adjudge and decree the payment, by the mortgagor, of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which he is personally liable for the debt secured; and if the debt be secured by the covenant or obligation of any other person, the plaintiff may make him a party to the action, and the court may adjudge payment of the residue remaining unsatisfied after a sale against such other person, and may enforce such judgment as in other cases. When judgment has been obtained on the bond, note, or debt secured by the mortgage, in case of any judgment having been obtained subsequent to the property being mortgaged, and prior to the obtaining judgment on the mortgage debt, the court may order the sale of the mortgaged property for the satisfaction of the moneys secured by the mortgage, and may give a reasonable extension of the time when the same is to take place, not exceeding the term of six months from the judgment, and also may give a reasonable credit on the sale not exceeding the term of twelve months from the sale; and the mortgagor is forever barred and foreclosed by such sale. If, at any time before such sale, the mortgagor tenders or pays to the plaintiff or his attorney, or to the sheriff, all the principal money and interest secured by the mortgage, and also the costs of suit, the sale does not take place, but the mortgagee must enter satisfaction of the mortgage.

The sale must be made in the county where the land lies, by the sheriff of the county, who executes a conveyance to the purchaser, which is effectual to pass the rights and interests of the parties adjudged to be sold.[1] There is no redemption.

No mortgagee is entitled to maintain any possessory action for the real estate mortgaged, even after the time allotted for the payment of the money secured by mortgage has elapsed; but the mortgagor is still deemed owner of the land, and the mortgagee, owner of the money lent or due, and is entitled to recover satisfaction for the same out of the land. On judgment being

[1] R. S. 1873, p. 642, § 310. Prior to this provision the sale might also be made by a referee appointed by the court for that purpose. Armstrong *v.* Humphreys, 5 S. C. 128.

obtained in the court of common pleas on any bond, note, or debt, secured by mortgage of real estate, it is lawful for the court, in case of any judgment having been obtained subsequent to the property being mortgaged, and prior to the obtaining judgment in the action hereby allowed to be commenced, to order the sale of the mortgaged property for the satisfaction of the moneys secured by the said mortgage, and to give a reasonable extension of the time when the same is to take place, not exceeding the term of six months from the judgment, and also to give a reasonable credit on the sale of the mortgaged premises, not exceeding the term of twelve months from the sale; and the mortgagor is forever barred and foreclosed by such sale from his equity of redemption. If, at any time before such sale, the mortgagor shall tender to or pay into the hands of the plaintiff or his agent or attorney, or to the sheriff, all the principal money and interest meant to be secured by such mortgage, and also all the costs of suit, the sale shall not take place, but the mortgagee shall enter satisfaction on the said mortgage, and the mortgaged premises are forever exempt from the said mortgage. When the same lands are mortgaged at divers times, the debts meant to be secured by such mortgages must be paid in the order the same are recorded.[1]

1358. Tennessee.[2] — Foreclosure is by bill in chancery and sale under decree. The officer whose duty it is to make the sale must, in the absence of any special provision in the decree, publish the sale at least three different times in some newspaper published in the county where it is to be made, the first of which publications shall be at least twenty days previous to the sale. The publication is dispensed with when the owner of the property so directs, or when no newspaper is published in the county, in which cases notice is posted for thirty days in at least five of the most public places in the county, one of which must be the court-house door, and another the most public place in the civil district where the land lies. The advertisement or notice must give the names of the plaintiff and defendant, or parties interested, and describe the land in brief terms, and mention the time and place of sale. A sale without such notice is not on that account void or voidable; but the officer failing to comply with these provisions is guilty of a misdemeanor and punishable accord-

[1] R. S. 1873, c. 116, §§ 1–4.

[2] Code, §§ 2145–2155.

ingly, and is moreover liable to the party injured for damages. At any time before ten in the forenoon on the day of sale, the owner of the property may deliver to the officer making the sale a plan or division of the lands, subscribed by him and bearing date subsequent to the advertisement, according to which so much of the land as may be necessary to satisfy the debt and costs, and no more, shall be sold. If no such plan is furnished, the land may be sold without division. The sale must be made between the hours of ten in the forenoon and four in the afternoon of the day appointed.[1]

The real estate sold may be redeemed at any time within two years, unless upon application of the complainant the court order it to be sold on a credit of not less than six months, nor more than two years, and that, upon confirmation by the court, no right of redemption shall exist in the debtor or his creditor, but that the title of the purchaser shall be absolute. This right of redemption extends to sales made under a deed of trust or mortgage by virtue of a power, without a judicial sentence, provided such right is not expressly waived or surrendered by the deed or mortgage.[2] Redemption is made by paying the purchaser the amount paid by him, with interest at the rate of six per cent. per annum, together with all other lawful charges. If the purchaser is a creditor by judgment, decree, or acknowledged by deed, and within twenty days after the sale makes an advance on his bid, and credits his debt, he may hold the property subject to redemption at the price bid and such advance. Any creditor may redeem in the same manner by advancing at least ten per cent. on the sum bid, or crediting that amount on the debt owing to him.[3]

1359. Texas. — Foreclosure is by suit in which judgment is rendered and a sale ordered.[4] The ordinary proceeding for foreclosure is by petition in the clerk's office of the district court of

[1] Upon any foreclosure of a mortgage or of a deed of trust the court may order that the property be sold on a credit of not less than six months nor more than two years; that there shall be no right of redemption, but the purchaser's title shall be absolute; and that the surplus be paid to the debtor. Compiled Stat. 1871, § 4489.

[2] See Chadbourn *v.* Henderson, 58 Tenn. 460. Before this provision a waiver of redemption was not binding. Caldwell *v.* Bowen, 4 Sneed (Tenn.), 415.

[3] Code, §§ 2124–2137.

[4] Power of sale mortgages are in use, but the plaintiff may also foreclose under the statute. The power of sale is only a cumulative remedy. Morrison *v.* Bean, 15 Tex. 269.

the county where such land or a part of it is situated, stating the case and the amount of the demand, and describing the property mortgaged. Whereupon the mortgagor is summoned to appear at the next term of the court, to show cause why judgment should not be rendered for the sum due on the mortgage with interest and costs. Judgment is rendered and execution issued as in other cases.[1] The judgment against other persons than executors or administrators is that the plaintiff recover his debt, damages, and costs, and that an order of sale issue to the sheriff of the county directing him to sell as under execution, and if the proceeds be insufficient to pay the judgment and costs, further execution may issue for the balance.[2]

Redemption may be had until the sale, but not afterwards. After the death of the mortgagor the order of sale must be obtained from the probate court.[3] The executor or administrator is cited to appear at the next term of the court to show cause. Instead of ordering a sale the court may order payment to be made out of the general assets if this be beneficial to the estate. If one joint mortgagor or owner of the equity be dead, the mortgagee must pursue his remedy against the representatives of the deceased in the probate court, so far as his interest is concerned, and the interest of the other mortgagor, who is living, must be foreclosed in the ordinary way in the district court.[4]

1360. Utah Territory.[5] There is but one action for the recovery of any debt, or the enforcement of any right secured by mortgage. In such action judgment is rendered for the amount found due the plaintiff, and a decree is entered for the sale of the property and the application of the proceeds to the payment of the expenses of sale, the costs of suit, and the amount due the plaintiff. A judgment is entered for any deficiency there may be against the mortgagor and others liable for the debt.

[1] Paschal's Dig. 1873, arts. 4675, 4676. See as to jurisdiction, Cavenaugh *v.* Peterson, 47 Tex. 197.

[2] Ib. art. 1480.

See, as to the decree of sale, Goss *v.* Pilgrim, 28 Tex. 267; Bishop *v.* Petty, 28 Tex. 321. As to form of decree, see Kinney *v.* McCleod, 9 Tex. 79, 80.

[3] Paschal's Dig. 1873, arts. 1329, 5705, and 5706; Cannon *v.* McDaniel, 46 Tex. 303. In such case the probate court must order the sale, even if the mortgage contains a power. This is revoked by the mortgagee's death. Fortson *v.* Caldwell, 17 Tex. 627; Boggess *v.* Lilly, 18 Tex. 200; Buchanan *v.* Monroe, 22 Tex. 542; Webb *v.* Mallard, 27 Tex. 83; Giddings *v.* Crosby, 24 Tex. 299. See § 1792.

[4] Martin *v.* Harrison, 2 Tex. 458; Buchanan *v.* Monroe, 22 Tex. 542; Wiley *v.* Pinson, 23 Tex. 486.

[5] Civil Practice Act, 1870, §§ 246–248.

Any surplus proceeds of sale must be paid to the person entitled to it, and in the mean time deposited in court. When the debt is not all due, the sale must cease as soon as sufficient property has been sold to satisfy the amount due; and as often as more becomes due for principal or interest, the court may on motion order a further sale. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid with a proper rebate of interest when necessary.

1361. Vermont.[1] — Foreclosure may be had in equity under general chancery jurisdiction. Whenever a decree shall have been made by the court to foreclose the right in equity of redeeming mortgaged premises, if the premises are not redeemed agreeably to the decree, the clerk of the court of chancery may issue a writ of possession to put the complainant in possession of the premises, which is executed in the same manner, and with the same effect, as similar writs issued by a court of law, after judgment in an action of ejectment. A petition in equity for foreclosure may be made with the same effect as by bill.[2]

When the time of redemption has expired, the decree in chancery or a copy of it must be recorded in the town clerk's office where the land is situated, within thirty days after the expiration of the time of redemption. The foreclosure is not effectual against subsequent purchasers, mortgagees, or attaching creditors, unless the decree is so recorded, or afterwards left for record before they acquire any rights.

Foreclosure may also be made by action of ejectment,[3] in which the court ascertains the sum equitably due to the plaintiff on the mortgage or deed with defeasance, and orders that if the defendant or his representatives shall pay or cause to be paid the amount then due the plaintiff with legal interest, to the clerk of the court,

[1] G. S. 1862, c. 29, §§ 74–79; c. 40, §§ 7–11. This is a strict foreclosure.

[2] In bill or petition to foreclose, any subsequent attaching creditor may be made defendant. St. 1864, No. 29.

[3] G. S. 1862, c. 40, §§ 7–11. This mode of foreclosure is applicable only where the conveyance is technically a mortgage by deed, to be void upon condition, or having a defeasance under seal. Miller *v.* Hamblet, 11 Vt. 499. The action may be maintained although the statute of limitations has run against the debt. Reed *v.* Shepley, 6 Vt. 602. The note secured by the mortgage must be produced; and a variance between the note produced and that described in the mortgage cannot be explained by parol, as a mistake. Edgell *v.* Stanfords, 3 Vt. 202. But it need not be produced when the mortgagor has released the equity in satisfaction of the note. Marshall *v.* Wood, 5 Vt. 250.

by a time limited by the court, not exceeding one year from the rendition of the judgment, then such judgment shall be vacated. If the debt is payable by instalments, a part of which is not due at the time the judgment is rendered, the court may order and decree a redemption at any future period, by instalments or otherwise, as to the court shall appear just and equitable, not more than one year after the last instalment shall become due. If the defendant pays within the time limited by the court the sums so ordered to be paid, the clerk delivers to him a certificate of payment, which when recorded in the proper registry of deeds defeats the mortgage. If the defendant does not pay as ordered by the time limited, the plaintiff has his writ of possession for the premises recovered, and for his damages and costs, and holds the premises discharged from all right and equity of redemption. When the time of redemption has expired, the plaintiff must record in the town clerk's office where the land is situated, within thirty days after the expiration of the time of redemption, a certified copy of the record of the suit. The foreclosure is not effectual as against subsequent purchasers, mortgagees, or attaching creditors, unless such record is so recorded or afterwards left for record prior to the acquiring of any interest in the lands by subsequent parties.[1]

It is held that if the mortgage embraces several parcels which have subsequently been transferred to different persons the mortgage must be apportioned upon the land according to their value, and the owner of each given a time to redeem his portion, and upon failure to do so he is foreclosed. If neither of such owners redeem, that is the end of it. If one redeems his portion, and the others do not, then the one redeeming must also redeem the portions of the others, or forfeit the whole estate, and if he does so redeem he takes the whole estate.[2]

1362. Virginia.[3] — Foreclosure is under the general jurisdiction of courts of equity. Mortgages, however, are now seldom or never used in this state, deeds of trust being substituted in their place.[4] There are no provisions of statute relating specificially to the foreclosure of mortgages. There are special provisions relating to deeds of trust,[5] and courts of equity may be invoked in any case to supervise the execution of them.[6] There are general

[1] G. S. c. 29, §§ 78, 79.
[2] Gates *v.* Adams, 24 Vt. 70.
[3] Code, 1873, p. 1122.
[4] Pitzer *v.* Burns, 7 W. Va. 63, 74.
[5] See chapter xxxix.
[6] Michie *v.* Jeffries, 21 Gratt. 334.

provisions relating to judicial sales which would be applicable to a foreclosure sale under decree of court, and to sales under trust deeds when made under direction of court. These authorize the court to direct the sale to be made for cash, or on such credit and terms as it may deem best; and it may appoint a commissioner to make the sale, who must give bonds before receiving any money under the decree. When no special commissioner is appointed the sheriff or sergeant may act.[1]

1363. **Washington Territory.** — When default is made in the performance of any condition contained in a mortgage, the mortgagee or his assigns may proceed in the district court of the district or county where the land or some part thereof lies, to foreclose the equity of redemption. When there is no express agreement in the mortgage, nor any separate instrument given for the payment of the sum secured thereby, the remedy is confined to the property mortgaged. In rendering judgment of foreclosure the court orders the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and cost of the action. The payment of the mortgage debt, with interest and costs, at any time before sale, satisfies the judgment. When there is an express agreement for the payment of the sum of money secured contained in the mortgage or any separate instrument, the court directs in the order of the sale that the balance due on the mortgage, with costs remaining unsatisfied after the sale, shall be levied on any property of the mortgage debtor. A copy of the order of sale and judgment is issued and certified by the clerk, under the seal of the court, to the sheriff, who thereupon proceeds to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest, and costs, as upon execution; and if any part of the judgment, interest, and costs remain unsatisfied, the sheriff forthwith proceeds to levy the residue upon the property of the defendant. The sheriff indorses upon the order of sale the time when he received it, and all subsequent proceedings under the order must conform to the provisions regulating sales of property upon execution. A notice must be

[1] All sales for the payment of debts contracted, or liabilities incurred prior to April 10, 1865, must be upon a credit of not less than three nor more than six equal instalments annually from the day of sale, except that the costs of the suit and sale must be paid in cash. The commissioner cannot sell for less than three fourths of the assessed value. Code, 1873, p. 1123. The commissioner or officer is allowed for services 5% on the first $300, and 2% on all above that.

posted, particularly describing the property, for four weeks successively, in three public places of the county where the property is to be sold, and must be published once a week for the same period, in a newspaper of the county, if there be one, or if there be none, then in a newspaper published nearest to the place of sale. The plaintiff cannot proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgment in such other action; nor can he prosecute any other action for the same matter while he is foreclosing his mortgage or prosecuting a judgment of foreclosure. Whenever a complaint is filed for the foreclosure of a mortgage upon which there shall be due any interest or instalment of the principal, and there are other instalments not due, if the defendant pay into court the principal and interest due, with costs, at any time before the final judgment, proceedings thereon shall be stayed, subject to be enforced upon a subsequent default in the payment of any instalment of the principal or interest thereafter becoming due. In the final judgment, the court directs at what time and upon what default any subsequent execution shall issue. In such cases, after final judgment, the court ascertains whether the property can be sold in parcels, and if it can be done without injury to the interests of the parties, the court directs so much only of the premises to be sold as may be sufficient to pay the amount then due on the mortgage, with costs, and the judgment remains and may be enforced upon any subsequent default, unless the amount due shall be paid before execution of the judgment is perfected. If the mortgaged premises cannot be sold in parcels, the court orders the whole to be sold, and the proceeds of the sale applied first to the payment of the principal due, interest, and costs, and then to the residue secured by the mortgage and not due; and if the residue do not bear interest, a deduction is made therefrom by discounting the legal interest; and in all cases when the proceeds of the sale are more than sufficient to pay the amount due and costs, the surplus is paid to the mortgage debtor, his heirs, and assigns. In all cases of foreclosure where there is a decree for the sale of the mortgaged premises or property, and a judgment over for any deficiency remaining unsatisfied after applying the proceeds of the sale of mortgaged property, further levy and sales upon other property of the judgment debtor may be made under

the same order of sale. In such sales it is necessary to advertise notice for two weeks only in a newspaper published in the county, or in the most convenient newspaper having a circulation in such county. An execution may issue as in ordinary cases, either for the whole mortgage debt or such deficiency, after applying the proceeds of the sale of mortgaged property. When, however, an execution shall issue upon a judgment recovered for a debt secured by mortgage, a schedule of the mortgaged property, real or personal, shall be indorsed upon such execution, and the sale thereof under such order shall foreclose the equity of redemption or the mortgage therein. Judgments over for any deficiency remaining unsatisfied after application of the proceeds of sale of mortgaged property are similar in all respects to other judgments for the recovery of money, and may be made a lien upon the property of the judgment debtor as other judgments, and the collection thereof enforced in the same manner.[1]

1364. West Virginia. — The foreclosure of mortgages in this state, the same as in Virginia, is by bill in chancery; and as is the case in that state, deeds of trust have been generally substituted for mortgages.[2] There are no statutory provisions in regard to enforcing the latter; though there are such in regard to sales under deeds of trust,[3] which may be made in accordance with the provisions of the deed and the statute without the intervention of the court, or may be supervised by it in equity. All judicial sales may be for cash, or on such credit and terms as the court may deem best; and it may appoint a special commissioner to make such sale. If no commissioner is appointed for the purpose the sheriff or sergeant executes the decree.[4]

1365. Wisconsin.[5] — In actions for the foreclosure of mortgages upon real estate, if the plaintiff recover, the court shall render judgment of foreclosure and sale of the mortgaged premises.

The proceeds of every sale made under such judgment are applied to the discharge of the debt adjudged to be due, and the costs awarded; and if there be any surplus, it is brought into court

[1] Laws, 1877, §§ 614–621, 623, 625; § 362, pl. 2.

[2] Pitzer *v.* Burns, 7 W. Va. 63, 74. Only one case relating to mortgages is found in the reports of this state, and the mortgage in that instance was made in New York.

[3] See chapter xxxix.

[4] Code, p. 734.

[5] R. S. 1878, c. 135.

for the use of the defendant, or of any person who may be entitled thereto, subject to the order of the court. If such surplus, or any part thereof, remain in court for the term of three months without being applied for, the court directs the same to be put out at interest for the benefit of the defendant, his representatives or assigns, to be paid to them by the order of such court.

In all such actions, the plaintiff may, in his complaint, unite with his claim for a foreclosure and sale a demand for judgment for any deficiency which may remain due to the plaintiff, after sale of the mortgaged premises, against every party who may be personally liable for the debt secured by the mortgage, whether the mortgagor or other persons, if upon the same contract which the mortgage is given to secure; and judgment of foreclosure and sale, and also for any such deficiency remaining after applying the proceeds of sale to the amount adjudged to be due for principal, interest and costs, may in such case be rendered. Such judgment for deficiency is ordered in the original judgment, and separately rendered against the party liable, on or after the coming in and confirmation of the report of sale, and is docketed and enforced as in other cases.

Whenever there is due any interest, or any instalment of the principal, and there be other portions or instalments to become due subsequently, the action is dismissed upon the defendant's bringing into court, at any time before judgment, the principal and interest due, with the costs. If after judgment is entered the defendant bring into court the principal and interest due, with the costs, proceedings on the judgment are stayed; but the court may enforce the judgment by a further order upon a subsequent default in the payment of any instalment of the principal, or of interest. The court, before rendering judgment, directs a reference to some proper person, to ascertain and report the situation of the mortgaged premises, and whether they can be sold in parcels without injury to the interests of the parties; and if it appear that they can be so sold, the judgment directs a sale in parcels, specifying them, or so much thereof as will be sufficient to pay the amount then due; and such judgment remains as security for any subsequent default. If there be any default subsequent to such judgment, the court may, upon petition of the complainant, by a further order, founded upon such first judgment, direct a sale of so much of the mortgaged premises to be made under the said judg-

ment as will be sufficient to satisfy the amount so due, with the costs of such petition and the subsequent proceedings thereon; and the same proceedings are had as often as a default happens. If it appear to the court that the mortgaged premises are so situated that they cannot be sold in parcels without injury to the interests of the parties, or that the sale of the whole will be most beneficial to them, the court may adjudge the sale of the whole accordingly, in which case the proceeds of sale, after deducting the costs of the action and of sale, are applied to the payment of the sums then due and also to become due thereafter; deducting from all sums not due, which do not bear interest, interest from the time of payment to the time when the same are payable; or the court may direct the balance of the proceeds of sale, after paying the sum then due, with such costs, to be placed at interest for the benefit of the plaintiff, to be paid to him as such subsequent instalments become due, with the interest thereon.

The judgment fixes the amount of the mortgage debt then due, and also the amount of each instalment thereafter to grow due, and the several times when they will become so due, and adjudges that the mortgaged premises be sold for the payment of the amount adjudged to be then due, and of all instalments which shall thereafter grow due before the sale, or so much thereof as may be sufficient to pay such amount, including costs of sale; but no such sale shall be made until the expiration of one year from the date of such judgment or order of sale; and when judgment is for instalments due and to grow due, and payment shall be made within the year of the instalments found due at the date of the judgment, with interest and costs, no sale shall be made upon any instalment growing due after the date of the judgment, until the expiration of one year after the same shall become due; but in all cases the parties may, by stipulation in writing, to be filed with the clerk, consent to an earlier sale. These provisions do not apply to judgments of foreclosure and sale of mortgages given by any railroad corporation; but such sales may be made immediately after the rendition of the judgment.

If any defendant appear and answer that any portion of the mortgaged premises is a homestead, the court ascertains whether such be the fact, and if so, whether the part of the mortgaged premises, not included in the homestead, can be sold separately therefrom without injury to the interests of the parties, and in

that case directs that the homestead shall not be sold until all the other mortgaged lands have been sold.

The amount adjudged to be due in the judgment draws interest at the rate of ten per cent. per annum, from its date until the date of sale or payment, and all instalments which become due after the date of such judgment draw interest at the same rate from the time the same become due. The court may also, in the judgment, enjoin the defendants and all persons claiming under them from committing any waste, or doing any act that may impair the value of such premises at any time after the date of the judgment.

The mortgagor, his heirs, personal representatives, or assigns, may redeem the mortgaged premises from the effect of said judgment, and the lien of the mortgage thereon, at any time before the sale of such premises, by paying to the clerk of the court, or to the plaintiff therein, or any assignee thereof, or to his attorney, the amount of such judgment, interest thereon as aforesaid, and costs, and any costs subsequent to such judgment, and any sums paid by the plaintiff subsequent to the judgment, for or in redemption of taxes assessed upon the mortgaged premises, with interest thereon from the date of payment at the same rate. On payment to such clerk as aforesaid, or on filing the receipt of the plaintiff, or his assigns or attorney, for such payment, in the office of said clerk, he thereupon discharges such judgment, and a certificate of such discharge, duly recorded in the office of the register of deeds, discharges such mortgage of record, to the extent of the sum so paid.

In case the mortgagor, his heirs, representatives, or assigns desire to pay a portion of such judgment, taxes, interest, and costs, so as to relieve any distinct lot or parcel of the premises which can be sold separately under such judgment from the lien thereof, and of such mortgage thereon, the court, on application of such person, and on notice to the parties to the action, may, if the amount to be paid therefor is not agreed upon, ascertain and adjudge the proportion of such judgment, taxes, interest, and costs to be paid for the purpose aforesaid; and when the amount so adjudged shall be paid, it relieves such distinct lot or parcel from such judgment and lien. Any heir, devisee, grantee, or assignee of the mortgagor, owning an undivided interest in the mortgaged premises, subject to the lien of the mortgage, may redeem such undivided

interest by paying a sum that will bear the same proportion to the whole of such judgment, taxes, costs, and interest as the interest proposed to be redeemed bears to the whole of the mortgaged premises.

Any person having a lien, acquired at any time before the sale, upon the mortgaged premises, or any part thereof, or interest therein, subsequent to the lien of any such mortgage, may also at any time before such sale pay, as above provided, the amount of such judgment, taxes, interest thereon as aforesaid, costs, and any costs subsequent to such judgment, and thereupon be subrogated to all the rights of the plaintiff as to such judgment, with full power to enforce the same, unless the same shall have been paid by the mortgagor, or person personally liable for the mortgage debt.

The sheriff or referee who makes sale of mortgaged premises under a judgment therefor shall give notice of the time and place of sale, in the manner provided by law for the sale of real estate upon execution, or in such other manner as the court shall in the judgment direct. He shall, within ten days thereafter, file with the clerk of the court a report of the sale, and immediately after the sale shall pay to the parties entitled thereto, or their attorneys, the proceeds of the sale, after deducting the cost thereof, unless otherwise ordered by court.

Upon any such sale being made, the sheriff or referee making the same, on compliance with its terms, shall make, execute, and deliver to the purchaser a deed of the premises sold, setting forth each parcel of land sold to him, and the sum paid therefor, which deed, upon the confirmation of such sale, vests in the purchaser all the right, title, and interest of the mortgagor, his heirs, personal representatives, and assigns, in and to the premises sold, and is a bar to all claim, right, or equity of redemption therein, of and against the parties to such action, their heirs and personal representatives, and also against all persons claiming under them subsequent to the filing of the notice of the pendency of the action in which such judgment was rendered; and the purchaser is let into the possession of the premises so sold, on production of such deed, or a duly certified copy, and the court may, if necessary, issue a writ of assistance to deliver such possession.[1]

The register of deeds shall, upon the filing of any *lis pendens*

[1] R. S. 1878, c. 135.

for the foreclosure of a mortgage, enter upon the margin of the record of such mortgage a memorandum of the filing of such notice and the date thereof.[1]

1366. Wyoming Territory.[2] — Mortgages are foreclosed in equity. In actions to enforce mortgages, a personal judgment is rendered for the amount due with interest, and for the sale of the property and the application of the proceeds, or such application may be reserved for further order of the court. When the mortgage embraces separate tracts of land situated in two or more counties, the sheriff of each county must make sale of the lands situated in the county of which he is sheriff.

[1] R. S. 1878, c. 37, § 76.

[2] Compiled Laws, 1876, c. 13, § 381, of the Civil Code.

CHAPTER XXXI.

THE PARTIES TO AN EQUITABLE SUIT FOR FORECLOSURE.

PART I.
Of parties plaintiff, 1368–1393.

PART II.
Of parties defendant, 1394–1442.

1367. General principles. — In determining who are the proper and necessary parties to a bill to foreclose a mortgage, two fundamental principles in all proceedings in equity must be kept in view: first, that no one shall be adjudged as to his rights except he is before the court; and second, that the rights of all persons interested in the object of the suit shall be provided for in the determination of it. It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation.[1] It is a maxim as stated by Lord Talbot, that "a court of equity in all cases delights to do complete justice, and not by halves."[2] Therefore it is generally essential that all persons materially interested in the subject matter of the suit shall be made parties to it either as plaintiffs or defendants.[3] This is, however, a general statement, and as a practical rule is subject to many limitations. Those who are indirectly or consequently interested in the mortgage debt or in the mortgaged premises are not necessarily included among the proper parties to the suit. The interest in the object of the suit must be apparent upon the record. When it is said that a person *materially* interested should be made a party to the suit, the materiality of the interest is relative to the case and to the prayer of the bill. For instance, a mortgagee

[1] Lord Redesdale's Pleadings, 164.

[2] Knight *v.* Knight, 3 P. W. 333.

[3] Per Lord Eldon, in Cockburn *v.* Thompson, 16 Ves. 325; per Sir Wm. Grant, in Wilkins *v.* Fry, 1 Mer. 262; per Lord Redesdale, Pl. 164; per Lord Langdale, in Richardson *v.* Hastings, 7 Beav. 326.

may pray for a foreclosure against the mortgagor and not against a subsequent incumbrancer, in which case such incumbrancer is not materially interested in the object of the suit. Then, as we shall presently notice more fully, the interests which persons have in the debt and in the equity of redemption may be represented by others, as by executors and administrators, and by trustees. Moreover, the suit may be brought or defended by persons interested on behalf of themselves and of others; as where the number is too large to make it practicable to bring all of them before the court. In several other ways the general rule founded upon interest is modified in the practical application of it; and these exceptions will appear under the particular applications of the rule to the parties interested in the mortgage debt and property to be made in this chapter.

Of course, when neither party to a mortgage has assigned his interest, or done anything to affect it in any way down to the time of the bringing of the suit to foreclose it, the mortgagor and mortgagee remain the only parties to be brought before the court. But this simple state of facts may be changed to one of great complication by events subsequent to the mortgage; and the changes which thus take place give rise to a great many questions as to the proper and necessary parties to a suit for foreclosure.

These general principles of equity respecting the parties to suits have been embodied in the codes adopted in several of the states, and extended to all actions, whether such as were formerly suits in equity or distinctively suits at law. These codes provide that all persons having an interest in the subject of the action, or in obtaining the relief demanded, may be joined as plaintiffs.[1] "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before

[1] Pomeroy's Remedies, § 116.

For a statement of the provisions in several states abolishing all distinction between suits at law and in equity, see chapter xxx; and also see Pomeroy's Remedies, §§ 28–30, 44.

the court, one or more may sue or defend for the benefit of the whole." [1]

In the same states it is provided that an executor, administrator, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted.[2] It is further provided that when a complete determination of the controversy between the parties before the court cannot be had without the presence of other parties, the court must cause them to be brought in. A person having an interest in the subject of the suit, and not a party to it, may be made a party on his own application.[3] These codes also contain a few other provisions relative to parties, generally recognizing equitable rules already established, but which it is not essential to notice in this connection.

PART I.

OF PARTIES PLAINTIFF.

Who are the Proper Parties.

1368. All those who are interested in the mortgage debt should, according to the general principle already stated, join in the suit to enforce the security. If the mortgagee is the only party in interest, he is of course the only plaintiff. If several persons and even numerous persons are made mortgagees, or are entitled to the mortgage money, all of them must be parties to the suit,[4] though there are many cases in which some of the persons so interested may properly be made defendants. The codes

[1] **New York**: § 119 of Code.
Ohio: §§ 36, 37.
Indiana: § 19.
Iowa: §§ 2548, 2549.
Wisconsin: c. 122, § 20.
Kansas: §§ 37, 38.
Nebraska: §§ 39, 40.
Missouri: Art. I, § 6, without the last clause.
Nevada: § 14.
Oregon: § 381, but limited to equitable actions.
California: § 382.
Kentucky: §§ 36, 37.
North Carolina: § 62.
South Carolina: § 142.
Florida: § 70.

[2] Pomeroy's Remedies, § 115.

[3] Ib. § 119.

[4] Palmer *v.* Carlisle, 1 S. & S. 425. Sir John Leach said: "There can be no foreclosure or redemption, unless the parties entitled to the whole mortgage money are before the court." Carpenter *v.* O'Dougherty, 2 T. & C. (N. Y.) 427; 67 Barb. 397; affirmed, 58 N. Y. 681.

of several states, as already noticed, embody this equitable principle, extending it to all actions, including such as were formerly distinctively actions at law. Not only joint mortgagees, but also persons having an united interest in the debt secured, even if their interests be several, may join as plaintiffs.[1]

1369. Joinder of plaintiff. — It is not very material, however, in an equity suit, whether more than one of the persons interested in prosecuting it is nominally made a plaintiff. It is generally sufficient that the persons to be bound by the decree shall be brought before the court in some capacity.[2] When a person having an interest in the security is made a defendant in the action, the bill ought to show his refusal to join as a plaintiff; but this omission is not material unless such defendant objects by demurrer.[3] If several persons have rights and interests in the same demand and security, even if these are not strictly joint, and are entitled to the same relief, they should naturally join as plaintiffs in seeking it. But if one of the persons so interested institutes the suit, and makes the others having like interests defendants, the requirements of equity are generally satisfied. If several persons have claims alike in being antagonistic to the defendant, but several and distinct in their nature, because they have arisen out of different events and circumstances, although they may join as co-plaintiffs in seeking the same relief, in actual practice one person, perhaps by reason of his greater interest or more urgent occasion for relief, institutes the suit without asking the coöperation of the others, making them defendants. And finally, as no one can be made a plaintiff against his will, this practical restriction in many cases determines the question whether a person shall be made a plaintiff or defendant.

There are, however, some decisions at variance with these generally established doctrines in equity. Thus, it was held in one case that where a mortgage was given to secure two or more notes

[1] Story's Eq. Pl. § 201; Pomeroy's Remedies, §§ 116, 117, 183; Story's Eq. Pl. § 201; Lowe *v.* Morgan, 1 Bro. C. C. 368; Stansfield *v.* Hobson, 16 Beav. 189; Palmer *v.* Carlisle, 1 S. & S. 425; Noyes *v.* Sawyer, 3 Vt. 160; Pogue *v.* Clark, 25 Ill. 351; Shirkey *v.* Hanna, 3 Blackf. (Ind.) 403; Stucker *v.* Stucker, 3 J. J. Marsh. (Ky.) 301; Woodward *v.* Wood, 19 Ala. 213.

[2] Wilkins *v.* Fry, 1 Mer. 262, per Sir William Grant: "In equity it is sufficient that all parties interested in the subject of the suit should be before the court, either in the shape of plaintiffs or defendants."

[3] Hancock *v.* Hancock, 22 N. Y. 568; Carpenter *v.* O'Dougherty, 58 N. Y. 681.

which were transferred to different persons, the holders could not join in an action to foreclose it, although a *pro rata* interest in the security was assigned, because the indebtedness having been severed the demands were distinct and separate. The rights of all parties were, however, protected and determined in one action in which the holder of one note was made plaintiff, and the holders of the others defendants, who answered in the form of cross-bills, and had their rights fixed by the decree.[1]

It is not material that the interests of the several plaintiffs should be coextensive, or that they should have originated at the same time. Neither is the extent of the interest material, if there be any interest at all; nor whether it be absolute or conditional.[2]

1370. Real party in interest. — Moreover the codes of all these states provide that "every action must be prosecuted in the name of the real party in interest,"[3] thus recognizing another established principle of equity and extending it to all actions. The application of this rule to the question, Who can prosecute a suit to foreclose a mortgage? is of special service in answering it in the case of an assignment of the mortgage, whether this be a legal or equitable assignment. If the assignee be the legal owner of both the mortgage and the mortgage debt, he must of course bring the action. If he is the equitable assignee only, he is still the proper plaintiff; and generally the only plaintiff necessary, though by statute in a few of the states the assignor retaining the legal title should be joined either as plaintiff or defendant.

A note and mortgage given to secure an indebtedness to a county made in terms to the supervisors of such county or their successors in office, may be declared upon as obligations to the county, and the suit may be brought in the name of the board of supervisors.[4]

1371. Plaintiff must have some interest. — After an absolute assignment the suit cannot be prosecuted in the mortgagee's name for the use of the assignee.[5] The plaintiff must have either the legal or equitable interest. If he has not both these interests, he must make the holder of the other interest a party with himself;

[1] Rankin *v.* Major, 9 Iowa, 297. To like effect see Thayer *v.* Campbell, 9 Mo. 280. But the court say that the proceeding to foreclose is one at law, and is not governed by the rules in equity.

[2] Pomeroy's Remedies, § 199.

[3] Pomeroy's Remedies, § 124.

[4] Oconto County *v.* Hall, 42 Wis. 59.

[5] Barraque *v.* Manuel, 7 Ark. 516.

if not plaintiff, then as defendant. The plaintiff must, however, have some interest either as mortgagee or assignee.[1] If he has only a partial interest, the remedy given is limited to the extent of that interest. Therefore where the holder of two mortgage notes assigned one of them, and afterwards brought suit to foreclose the other, he was not allowed to take judgment for the amount of the assigned note as well as for that of the note retained by him, although he was liable upon the other note as indorser.[2]

1372. Form of assignment immaterial. — It is apparent, therefore, that a formal legal assignment is not requisite in equity to enable the assignee to enforce the mortgage in his own name. If he is the real party in interest, the form by which he acquires this interest is quite immaterial. A verbal assignment, even, of the bond and mortgage gives the assignee an equitable claim to them, and enables him to bring an action upon them in his own name.[3]

1373. If the mortgage has been assigned absolutely and the mortgagee retains no further interest in it, he is not a proper party to the suit.[4] "It is enough to make that man a party who has contracted to stand in the place of the original mortgagee and of all assignees."[5]

1374. A mortgagee who has assigned his mortgage as collateral security for his own debt, but still has an interest in the mortgage, should be made a party to a suit by the assignee to foreclose it, although the assignment be in terms absolute, and recites the payment of a full consideration for it.[6] If, however, it appears from the assignment that it was the intention of the assignor to give the assignee the right to foreclose, or to receive the moneys in his own name, it is unnecessary to make the as-

[1] Bolles *v.* Carli, 12 Minn. 113.

[2] Haynes *v.* Seachrest, 13 Iowa, 455.

[3] Green *v.* Marble, 37 Iowa, 95; Andrews *v.* M'Daniel, 68 N. C. 385. This last was an unindorsed note.

[4] Walker *v.* Smalwood, 2 Amb. 676; Gaskell *v.* Durdin, 2 Ba. & Be. 167; Miller *v.* Henderson, 10 N. J. Eq. (2 Stockt.) 320; Parker *v.* Stevens, 3 N. J. Eq. (2 Green) 56; McGuffey *v.* Finley, 20 Ohio, 474; Christie *v.* Herrick, 1 Barb. (N. Y.) Ch. 254; Whitney *v.* M'Kinney, 7 Johns. (N. Y.) Ch. 144; Garrett *v.* Puckett, 15 Ind. 485; Walker *v.* Bank of Mobile, 6 Ala. 452; Newman *v.* Chapman, 2 Rand. (Va.) 93.

[5] Chambers *v.* Goldwin, 9 Ves. 264.

[6] Hobart *v.* Abbot, 2 P. Wms. 643; Gage *v.* Stafford, 1 Ves. Sen. 544; Johnson *v.* Hart, 3 Johns. (N. Y.) Cas. 322; Whitney *v.* M'Kinney, 7 Johns. (N. Y.) Ch. 144; Kittle *v.* Van Dyck, 1 Sandf. (N. Y.) Ch. 76.

signor a party, although he retains an interest in the mortgage. It was so held where the assignment was absolute in form, except that it stated that the money, when collected, was to be applied in liquidation of the debts for which the complainant stood security for the assignor.[1] It is proper, however, to join both the assignor and assignee as plaintiffs in the action.[2]

1375. One who holds the mortgage as a collateral security for a smaller debt due him from the assignor must make the latter a party to the suit to enforce it, inasmuch as he is interested to the amount of the surplus above his debt.[3] This is in accordance with the general rule that all who are interested in the mortgage debt must be made parties to the foreclosure suit. And if in any way the assignment of the mortgage be not absolute, and the mortgagee retains an interest in the security, he is a necessary party.[4] Even if the assignment is absolute in its terms and expresses the payment of a full consideration, the mortgagee should still be made a party if the assignee is accountable to him for any part of the proceeds of it.[5] The fact that he is liable to account does not, however, impair the right of the assignee to enforce collection of the mortgage.[6] This only affects the amount for which he may have a decree. He is the proper party to institute the proceedings, having the legal and apparent title.[7] If in such case the assignee refuses to foreclose and the collateral character of the assignment appears on the face of it, the assignor may foreclose in his own name;[8] and it would seem that his interest might be established by evidence aside from anything upon the face of the assignment, so that he might enforce the mortgage upon the neglect or refusal of the assignee to do so, on the same principle by which it is held that a verbal assignment of a bond and mortgage entitles the assignee to sue in his own name.[9] In such case the assignee may be made a party defendant, and

[1] Christie *v.* Herrick, 1 Barb. (N. Y.) Ch. 254.

[2] Hoyt *v.* Martense, 16 N. Y. 231.

[3] Woodruff *v.* Depue, 14 N. J. Eq. 168, 176.

[4] Miller *v.* Henderson, 2 Stockt. (N. J.) 320.

[5] Kittle *v.* Van Dyck, 1 Sandf. (N. Y.) Ch. 76.

[6] Overall *v.* Ellis, 32 Mo. 322.

[7] McKinney *v.* Miller, 19 Mich. 142; Norton *v.* Warner, 3 Edw. (N. Y.) Ch. 106.

[8] Simson *v.* Satterlee, 6 Hun (N. Y.), 305; Norton *v.* Warner, *supra;* Sinking Fund Commissioners *v.* Northern Bank of Kentucky, 1 Metc. (Ky.) 174.

[9] See § 1377.

neither the mortgagor nor any person other than the assignee himself can object.[1]

1376. The assignee of a mortgage without the bond or note secured by it has no interest in it as against a subsequent assignee of both and cannot foreclose it.[2] The debt is the principal thing, and the mortgage only the incident. The assignment of the mortgage by delivery merely does not carry with it the bond or note, and is not conclusive evidence of an intention to pass it; although generally the mortgage passes by a transfer of the bond or note so as to make an equitable transfer of the mortgage.

1377. Assignee of mortgage note. — In most of the states the doctrine prevails that the mortgage debt is the essential fact, and the mortgage itself a mere incident of it; and as a consequence that a transfer of the note or other evidence of the debt carries with it the security without a special assignment of it. In those states, therefore, a suit to foreclose the mortgage may be brought by the assignee without making the mortgagee who assigned it a party.[3] The holder of the mortgage without the debt has no interest in it. The equitable assignee may, however, join the assignor with him in the suit,[4] or make him a defendant.[5] Even where the assignment of the note is held not to be an assignment of the mortgage, it has been held nevertheless that the assignee of the note acquires an equitable interest which a court of equity will protect, though all parties, whether having equitable or legal interests, must be parties to the suit.[6] Under the practice in some states, the assignee of the note in such case may sue in the name of the mortgagee, even against his consent, on giving him proper indemnity against costs.[7]

1378. The holder of one of several notes secured by the same mortgage may proceed in the first instance to foreclose by suit in equity without suing at law; but all the other mortgagees or holders of notes secured by it must be brought before the court

[1] Simson *v.* Satterlee, 6 Hun (N.Y.) 305.

[2] Cooper *v.* Newland, 17 Abb. (N. Y.) Pr. 342; Merritt *v.* Bartholick, 47 Barb. (N. Y.) 253.

[3] Gower *v.* Howe, 20 Ind. 396; Garrett *v.* Puckett, 15 Ind. 485; Austin *v.* Burbank, 2 Day (Conn.), 476; Briggs *v.* Hannowald, 35 Mich. 474.

[4] Holddrige *v.* Sweet, 23 Ind. 118.

[5] Burton *v.* Baxter, 7 Blackf. (Ind.) 297; Stone *v.* Locke, 46 Me. 445.

[6] Moore *v.* Ware, 38 Me. 496; Stone *v.* Locke, *supra.*

[7] Calhoun *v.* Tullass, 35 Ga. 119; English *v.* Register, 7 Ga. 387.

as defendants before a decree is made.[1] There are as many causes of action as there are separate notes in the hands of different persons. Two holders of notes cannot join as plaintiffs to enforce the mortgage. There is no community of interest between such holders, but rather an antagonism. Only one such holder can be plaintiff, and he must make the other holders defendants, so that the amounts and priorities of their several liens may be determined.[2] The plaintiff's allegation, that another note secured by the mortgage may be presumed from lapse of time and other circumstances to have been paid, is insufficient to excuse his not making the assignee of it a party to the suit.[3]

1379. A partner who holds a mortgage as security for a debt due the partnership should join the other partners with him as plaintiffs in an action to foreclose it.[4]

1380. A surety of a debt secured by mortgage on lands of the principal on paying the debt is subrogated in equity to the rights of the mortgagee, and may foreclose in his own name without an assignment of the mortgage and bond.[5] In like manner a purchaser who has assumed the payment of a mortgage on land which he has subsequently sold to another, who in turn has assumed the mortgage, but has failed to pay it, may upon being obliged to pay it foreclose it in his own name without having an assignment of it.[6] And a person interested in the land subject to the mortgage, though not personally bound to pay it, upon doing so for his own protection has the same right.[7] It is even held that without paying the debt a surety may file a bill to foreclose the mortgage, making the mortgagee a party, and asking for judgment against the persons primarily liable.[8]

[1] Goodall *v.* Mopley, 45 Ind. 355; Stanley *v.* Beatty, 4 Ind. 134; Merritt *v.* Wells, 18 Ind. 171; Rankin *v.* Major, 9 Iowa, 297; Myers *v.* Wright, 33 Ill. 284; Pogue *v.* Clark, 25 Ill. 351; Wilson *v.* Hayward, 2 Fla. 27; Wiley *v.* Pinson, 23 Tex. 486; Hartwell *v.* Blocker, 6 Ala. 581; Johnson *v.* Brown, 11 Fost. (N. H.) 405; Pettibone *v.* Edwards, 15 Wis. 95; Jenkins *v.* Smith, 4 Metc. (Ky.) 380.

[2] Swenson *v.* Moline Plough Co. 14 Kans. 387.

[3] Bell *v.* Shrock, 2 B. Mon. (Ky.) 29.

[4] Noyes *v.* Sawyer, 3 Vt. 160.

[5] Ellsworth *v.* Lockwood, 42 N. Y. 89; Halsey *v.* Reed, 9 Paige (N. Y.), 446.

[6] McLean *v.* Towle, 3 Sandf. (N. Y.) Ch. 117; Tice *v.* Annin, 2 Johns. (N. Y.) Ch. 125; Cherry *v.* Monro, 2 Barb. (N. Y.) Ch. 618; Ferris *v.* Crawford, 2 Den. (N. Y.) 595; Johnson *v.* Zink, 52 Barb. (N. Y.) 396; Brewer *v.* Staples, 3 Sandf. (N. Y.) Ch. 579.

[7] Ellsworth *v.* Lockwood, *supra;* Averill *v.* Taylor, 8 N. Y. 44.

[8] Marsh *v.* Pike, 1 Sandf. (N. Y.) Ch. 210; 10 Paige, 595; McLean *v.* Lafayette, 3 McLean, 587.

1381. Joint mortgagees. — Where one of two joint mortgagees has become the owner of the equity of redemption, the other can maintain against him a bill for foreclosure to the extent of his interest.[1] In like manner a note and mortgage given by thirteen persons to three of their number may be foreclosed for ten thirteenths of the debt, by a suit in which the three join as plaintiffs against the others as defendants.[2] A mortgagee of an undivided interest may foreclose that interest, although he is the owner of the other undivided part of the land;[3] or although a suit for partition is pending.[4] A mortgagee is not prevented from foreclosing by reason of being one of the trustees who hold the equity of redemption; he may bring the action against his co-trustees;[5] or one of several executors holding the estate; he may as mortgagee foreclose his mortgage upon it against his co-executors.[6]

1382. When a mortgage secures an indebtedness due to the mortgagees jointly, their interest in the estate so far partakes of the nature of the debt that the doctrine of survivorship applies, and the suit to foreclose may be brought in the name of the survivor without making the heir or personal representatives of the deceased mortgagee a party.[7] If there are conflicting claims as to the mortgage money, the executor of the deceased mortgagor should be made a defendant.[8] The survivor of joint assignees of a mortgage of course has the same right to foreclose, without joining the personal representatives of the deceased assignee, that the survivor of joint mortgagees has.[9]

If, however, the money equitably belonged to the mortgagees severally, the representatives of one of the deceased mortgagees should be joined with the survivor.[10]

1383. It is a general rule that a nominal trustee cannot bring the suit in his own name alone, but must join with him the names of those persons who have the beneficial interest.[11] But

[1] Sanford *v.* Bulkley, 30 Conn. 344.

[2] McDowell *v.* Jacobs, 10 Cal. 387.

[3] Baker *v.* Shephard, 30 Ga. 706.

[4] Gleises *v.* Maignan, 3 La. 530.

[5] Paton *v.* Murray, 6 Paige (N. Y.), 474.

[6] McGregor *v.* McGregor, 35 N. Y. 218; Lawrence *v.* Lawrence, 3 Barb. (N. Y.) Ch. 71.

[7] Williams *v.* Hilton, 35 Me. 547; Blake *v.* Sanborn, 8 Gray (Mass.), 154; Martin *v.* McReynolds, 6 Mich. 70; Lannay *v.* Wilson, 30 Md. 536; Milroy *v.* Stockwell, 1 Cart. (Ind.) 35; Erwin *v.* Ferguson, 5 Ala. 158; McAllister *v.* Plant, 54 Miss. 106.

[8] Freeman *v.* Scofield, 16 N. J. Eq. 26.

[9] Martin *v.* McReynolds, 6 Mich. 70.

[10] Vickers *v.* Cowell, 1 Beav. 529.

[11] Davis *v.* Hemingway, 29 Vt. 438; Stillwell *v.* McNeely, 1 Green's (N. J.) Ch. 305; Freeman *v.* Scofield, 16 N. J.

where, on account of the number of the persons interested, great inconvenience and expense would be incurred in joining them in the bill, the court will in its discretion dispense with a strict adherence to this rule.[1] Accordingly where a mortgage was made to a banker as "the agent and trustee of the several subscribers to the loan," which was of large amount, it was held that the mortgagee might file the bill in his own name alone.[2] And where a bill is brought by the trustees of a mortgage by a railroad company to foreclose the mortgage, the holders of the bonds secured are not necessary or proper parties complainant, though there may be circumstances which would authorize the court to admit any of them as defendants on their own application.[3]

If, however, the only object of the foreclosure suit is to reduce the property into possession, it is not necessary to make the *cestui que trust* a party to it.[4]

1384. If a cestui que trust brings a bill to foreclose, the trustee is an indispensable party, because it is more particularly the legal estate that is affected by the decree of foreclosure and sale, and in case of redemption the trustee is the one to release the property. The trustee and the beneficiary should unite as plaintiffs.[5]

1385. A holder of bonds secured by a mortgage may file a bill to foreclose in behalf of himself and the other bondholders, whose rights the court will protect, though they be not made parties and do not appear.[6] This is in accordance with the equitable principles already stated, and adopted in the several codes, that one or more of many persons having a common interest, or of persons so numerous as to render it impracticable to bring them all before the court, may sue in behalf of the whole.

Eq. 28; Woodruff *v.* Depue, 14 N. J. Eq. 168, 176; Large *v.* Van Doren, 14 N. J. Eq. 208.

[1] Bardstown, &c. R. R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199; Swift *v.* Stebbins, 4 Stew. & Port. (Ala.) 447; Wright *v.* Bundy, 11 Ind. 398.

[2] Willink *v.* Morris Canal & Banking Co. 3 Green's Ch. (N. J.) 377.

[3] Williamson *v.* N. J. Southern R. R. Co. 25 N. J. Ch. 13; McElrath *v.* Pittsburg & Steubenville R. R. Co. 68 Pa. St. 37. See Jones on Railroad Securities, §§ 431–437.

[4] Sill *v.* Ketchum, Harr. (Mich.) Ch. 423.

[5] Story Eq. Pl. §§ 201, 209; Wood *v.* Williams, 4 Madd. 186; Hichens *v.* Kelly, 2 Sm. & G. 264; Martin *v.* McReynolds, 6 Mich. 70.

[6] Mason *v.* York, &c. R. R. Co. 52 Me. 82; Coe *v.* Beckwith, 10 Abb. (N. Y.) Pr. 296; Reid *v.* The Evergreens, 21 How. (N. Y.) Pr. 319. See Blair *v.* Shelby Co. Agr. Soc. 28 Ind. 175; Bardstown, &c. R. R. Co. *v.* Metcalf, *supra*.

1386. Trustee for creditors. — Another exception to the general rule is made in the case of a trustee of a fund for the benefit of creditors, who may generally sue without bringing the creditors before the court.[1] In many cases it would be impossible to make all the creditors parties, as where they are not designated except as a person's creditors.

1387. Upon the death of the mortgagee the right of action upon the mortgage securities is in his executor or administrator, and not in the heir of the mortgagee.[2] The land is regarded as merely a security for the money and not as real estate absolutely vested in the mortgagee, and which upon his death goes to his heir, although this was the view formerly taken.[3] The entry of the mortgagee after forfeiture does not make the mortgaged property his real estate. Until foreclosure is complete the land belongs to the mortgagor. Neither does the absence of any personal obligation by bond, note, or covenant for the debt affect the right of the personal representative to collect the money due by the mortgage. The heir of the mortgagee holds the legal title in trust for the personal representative.

Of course the mortgagee may, by his will or otherwise, provide that the mortgage security shall go to his heir as devisee; and then the right of the heir to sue rests upon the authority so given. One to whom a specific mortgage is bequeathed for life may maintain a bill to foreclose it, although there be a further bequest over to another of the remainder after the death of the first taker.[4] Such immediate legatee is entitled to the possession of the securities, and as well to the possession of the proceeds of the same upon collection. It is necessary that such holder of securities should have the authority to convert them into money in order to obtain the income and protect the property from loss.[5]

1388. The personal representative of the mortgagee upon

[1] Morley *v.* Morley, 25 Beav. 253; Knight *v.* Pocock, 24 Beav. 436; Thomas *v.* Dunning, 5 De G. & S. 618; Christie *v.* Herrick, 1 Barb. (N. Y.) Ch. 254.

[2] It is provided by statute in several states that upon the death of a holder of a mortgage without having foreclosed the equity of redemption, the mortgage is personal assets in the hands of his executor or administrator.

Michigan: Compiled Laws, 1871, p. 1393.

Maryland: Code, 1860, art. 64, § 20.

Maine: Rev. Stat. 1871, c. 90, § 1.

Ohio: R. S. (S. & C.) c. 43, § 66.

Wisconsin: Rev. Stat. 1871, p. 1223.

Vermont: Gen. Stat. 1870, p. 393, §§ 27, 28.

[3] St. John *v.* Grabham (11 Car. 1), 2 Ch. Ca. 88; Noy *v.* Ellis, 2 Ch. Ca. 220.

[4] Proctor *v.* Robinson, 35 Mich. 284.

[5] Sutphen *v.* Ellis, 35 Mich. 445.

the death of the latter is the proper party to bring an action to foreclose the mortgage, this being personal assets. His heirs cannot maintain the bill; nor can his devisee or legatee.[1] Formerly it was held that the heirs should be joined, because, if the mortgagor should redeem, there would be no one before the court by whom an effectual conveyance of the legal estate could be made.[2] But in this country the heir has been held a necessary party in only two or three states.[3] All the administrators or executors who have qualified should join in the suit.[4]

When, however, the heir of the mortgagee is in possession of the premises, the personal representative should make him a party, either plaintiff or defendant.[5]

1389. A foreign executor or administrator must receive appointment from the proper court in the state where the mortgaged land is situate, before he will be allowed to prosecute a suit to foreclose the mortgage.[6] The legal objection to allowing a foreign executor or administrator to prosecute such suit is that better protection is afforded to creditors of the deceased resident in the state where the property is situated, by requiring an appointment under the laws of that state, and thereby making the representative of the deceased liable to account in that state for the assets there collected by him; so that creditors and others in such state are not obliged to go to a foreign jurisdiction to prosecute their claims.[7]

Another practical advantage of the requirement is, that by such appointment in the state where the property is situated evidence of the authority of the personal representative to act in place of the deceased mortgagee, and to make discharge of the mortgage, is to be found in that state; and this alone is sufficient ground for requiring such appointment in every case, even when voluntary

[1] Kinna *v.* Smith, 3 N. J. Eq. (2 Green) 14; Buck *v.* Fischer, 2 Colo. 182; Roath *v.* Smith, 5 Conn. 133; Ratliff *v.* Davis, 38 Miss. 107; Grattan *v.* Wiggins, 23 Cal. 16.

[2] Powell Mortg. 970; Wood *v.* Williams, 4 Madd. 185; Worthington *v.* Lee, 2 Bland Ch. (Md.) 678.

[3] McIver *v.* Cherry, 8 Humph. (Tenn.) 713; Atchison *v.* Surguine, 1 Yerger, (Tenn.) 400; Etheridge *v.* Vernoy, 71 N. C. 184, 187.

[4] 1 Daniells Ch. Pr. p. 226; Davies *v.* Williams, 1 Sim. 5.

[5] Huggins *v.* Hall, 10 Ala. 283; Osborne *v.* Tunis, 25 N. J. L. (1 Dutch.) 633.

[6] Trecothick *v.* Austin, 4 Mason, 16, 33; Williams *v.* Storrs, 6 Johns. (N. Y.) Ch. 353; Brown *v.* Brown, 1 Barb. (N. Y.) Ch. 189.

[7] Peterson *v.* Chemical Bank, 32 N. Y. 21, 43; S. C. 29 How. Pr. 240.

payment of the mortgage is to be made; or when an assignee, resident in the state, claims payment by virtue of an assignment to him by a foreign executor or administrator; for although such assignee can prosecute an action to foreclose the mortgage,[1] the record title to the estate made through such foreclosure is objectionable, inasmuch as there is no evidence in the state of the authority by which the foreign executor or administrator made the assignment.[2]

Objection that the foreign executor or administrator has no standing in court to enforce the mortgage must be made by demurrer or answer, or it will be deemed to have been waived.[3]

1390. Mortgage to executor. — A mortgage made to A. B., "acting executor of the estate of T. T., deceased," is *primâ facie* the private property of A. B., and upon his decease a bill to foreclose it should be brought by his personal representative; but if it be alleged in the bill and shown that the mortgage is part of the assets of the estate of T. T., an administrator with the will annexed of his estate may foreclose it.[4] The personal representatives of A. B. should be made parties to the suit, because *primâ facie* the security vests in them.[5]

1391. When one person holds two mortgages upon the same premises, he is not allowed to bring separate foreclosure suits.[6] If they are of different dates and secure different debts, when the decree is for a sale of the property, it should direct the payment of the first mortgage out of the proceeds of sale, and that the residue be paid into court for the benefit of subsequent incumbrancers.[7] In case of a strict foreclosure, one decree is made embracing both mortgage debts, instead of two decrees each limiting a time of redemption for each mortgage.[8] The holder of the two mortgages may foreclose them in one suit, although they were

[1] Peterson *v.* Chemical Bank, 32 N. Y. 21, 43; and see Smith *v.* Webb, 1 Barb. (N. Y.) 230, that a legatee under a will proved in another state may sue.

[2] See § 797.

[3] McBride *v.* Farmers' Bank of Salem, 26 N. Y. 457; Zabriskie *v.* Smith, 13 N. Y. 322.

[4] Peck *v.* Mallams, 10 N. Y. 509; People *v.* Keyser, 28 N. Y. 226; Renaud *v.* Conselyea, 4 Abb. (N. Y.) Pr. 280; affirmed 5 Ib. 346.

[5] Peck *v.* Mallams, *supra.*

[6] Roosevelt *v.* Ellithorp, 10 Paige (N. Y.), 415; Newman *v.* Ogden, 6 Ch. Dec. (N. Y.) 40; Kellogg *v.* Babcock, 1 Ch. Dec. (N. Y.) 47; Fitzhugh *v.* McPherson, 3 Gill (Md.), 408.

[7] Kellogg *v.* Babcock, *supra.*

[8] Phelps *v.* Ellsworth, 3 Day (Conn.), 397.

given by different persons but to secure the same debt.[1] Where there are several simultaneous mortgages of the same property, though they secure different debts, one not entitled to a preference over the others cannot be foreclosed alone. The complainant should ask the other mortgagees to join with him in foreclosing all the mortgages, and on their refusal so to do should make them defendants.[2]

1392. A mortgage executed to persons in an official capacity may be foreclosed by their successors in the office in their own names as equitable assignees of the security; as in case of a mortgage given to the receivers of an insolvent corporation. The successor is in such case an equitable assignee, and though he could not sue in his own name at law he may do so in equity.[3]

If the mortgagee becomes bankrupt, his assignee may foreclose the mortgage without joining him as a party. Though there be a possibility that there may be property more than enough to pay the creditors, the presumption from the adjudication is that there will not be; and therefore he is not regarded as having any interest sufficient to entitle him to be made a party. And such would be the case also where a corporation holding a mortgage has been declared insolvent, and its property placed in the hands of a receiver.[4]

1393. A wife owning a mortgage as her separate property cannot join her husband as a co-plaintiff to foreclose it. Objection, however, to the joining of the husband should be taken by demurrer, and cannot be insisted upon at the hearing.[5] When the note and mortgage were given to a husband and wife as security for money loaned by the wife, upon the death of the husband the wife was held to be the proper party to sue in her own name, on either of two grounds, — as surviving mortgagee, or because the mortgage concerned her separate estate.[6]

[1] McGowan *v.* Branch Bank at Mobile, 7 Ala. 823.

[2] Potter *v.* Crandall, Clarke (N. Y.) Ch. 119.

[3] Iglehart *v.* Bierce, 36 Ill. 133.

[4] Iglehart *v.* Bierce, *supra.*

[5] Bartlett *v.* Boyd, 34 Vt. 256.

[6] Shockley *v.* Shockley, 20 Ind. 108.

PART II.

OF PARTIES DEFENDANT.

Who are the Necessary or Proper Parties.

1394. General principles. — In respect to the defendants in foreclosure suits they are either necessary or proper parties.[1] A necessary party is one whose presence before the court is indispensable to the rendering of a judgment which shall have any effect upon the property; without whom the court might properly refuse to proceed, because its decree would be practically nugatory. The person who in this sense is a necessary party defendant is the owner of the equity of redemption; but the ownership of the land subject to the mortgage may be distributed among several persons, one of whom is no more necessary to the rendering of an effectual judgment than another. Moreover the equity of redemption may have been conveyed again and more than once in mortgage, and the person who holds the title subject to the mortgages may have an interest which is in fact of no value, while the holders of the subsequent mortgages have valuable interests; yet according to the cases the owner of the unconditional title which is of no value is a necessary party, and the subsequent mortgagees are only proper parties. It is not, however, the value of the interest held by any one which in any way determines whether he is a necessary party or not; for although the interest of the owner of the equity may be valueless, yet a decree of foreclosure and sale is effectual in cutting off that interest, and in transferring the title subject to the rights of subsequent incumbrancers, if they have not been made parties. The decree is at any rate effectual in stopping the further transfer or incumbrance of the title, and this is doubtless the reason why the owner of the equity of redemption is regarded as a necessary party.

In one sense every person who has acquired any interest in the property subsequent to the mortgage is a necessary party to the suit for foreclosure; whether that interest be by way of a mort-

[1] The codes of the several states before mentioned provide that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein." See Pomeroy's Remedies, § 271.

gage or judgment lien, an inchoate right of tenancy in dower or curtesy, or an unconditional estate in fee; because in order to make the foreclosure complete, and to transfer a perfect title by the sale, it is necessary that the holder of every such right or interest should be brought before the court. A party may be necessary in this sense, although this term has generally been used only to designate the present owner of the property, without whom the general ownership of the property cannot be transferred by a sale under the decree. It is doubtless for this reason that there is much confusion in the cases as to the persons who are necessary parties to the suit. As a practical matter, however, the distinction between necessary and proper parties is not of much consequence; for the suit, though effectual in cutting off the estate or interest of the parties to it, is generally ineffectual as a foreclosure, unless every interest subsequent to the mortgage is cut off by the decree and sale under it; for if a stranger purchases, he may decline to take the title, if any lien or right is left outstanding; and if the mortgagee himself buys, he only subjects himself in such case to the expense of another suit, to get rid of the rights that others still have in the property.

To obtain a judgment for any deficiency there may be after the sale, the debtor and any other person who may have assumed the debt are necessary parties; but as the primary object of the suit is to divest the title of the holder of the equity of redemption, and of others interested in it, and to transfer this by sale to a purchaser, the fact that one is personally liable for the debt makes him a proper party, but not in the general use of the term a necessary one.

1395. When a party in interest, other than the owner of the equity of redemption, is not made a party to the bill, the foreclosure is not generally for this reason wholly void. It is effectual as against those persons interested in the equity who are made parties. The sale vests the estate in the purchaser, subject to redemption by the owner of the equity, or other person interested in it, who was not made a party to the proceedings.[1] His

[1] Story's Eq. Pleadings, § 193; Matcalm *v.* Smith, 6 McLean, 416; Martin *v.* Noble, 29 Ind. 216; Kelgour *v.* Wood, 64 Ill. 345; Ohling *v.* Luitjens, 32 Ill. 23; Cutter *v.* Jones, 52 Ill. 85; Hodgen *v.* Guttery, 58 Ill. 431; Strang *v.* Allen, 44 Ill. 428; Dunlap *v.* Wilson, 32 Ill. 517; Bradley *v.* Snyder, 14 Ill. 263; Frische *v.* Kramer, 17 Ohio, 125; Hall *v.* Hall, 11 Tex. 526; Webb *v.* Maxan, 11 Tex. 686; Tallman *v.* Ely, 6 Wis. 244; Hodson *v.* Treat, 7 Wis. 263; Porter *v.* Kilgore, 32

only remedy, however, is to redeem. He cannot maintain ejectment against the purchaser. He cannot have the sale set aside by intervening by petition in the foreclosure suit. His only right is the right of redemption.[1] The sale, though it fails to be effectual in every other respect, operates as an assignment of the mortgage and all the mortgagee's rights to the purchaser, who may proceed *de novo* to foreclose.[2] If in such case the prior mortgagee himself purchases at the sale, he becomes merely a mortgagee in possession.[3]

It is in many cases a matter of much expense and inconvenience to join as parties all the subsequent incumbrancers; but it is much more expensive and inconvenient to omit any. A purchaser will hardly take an estate which may be redeemed, and thus incur the liability of a suit to redeem, and of being called upon to account.[4] Of course, it is the right of the plaintiff to

Iowa, 379; Douglass *v.* Bishop, 27 Iowa, 214; Veach *v.* Schaup, 3 Iowa, 194; Valentine *v.* Havener, 20 Mo. 133; Brundred *v.* Walker, 12 N. J. Eq. 140; McCall *v.* Yard, 3 Stockt. (N. J.) 58; S. C. 1 Ib. 358; Vanhorn *v.* Duckworth, 7 Ired. (N. C.) Eq. 261; Haffley *v.* Maier, 13 Cal. 13.

[1] Person *v.* Merrick, 5 Wis. 231; Goodman *v.* White 26 Conn. 317; Thompson *v.* Chandler, 7 Me. 377; Bradley *v.* Snyder, 14 Ill. 263; Benedict *v.* Gilman, 4 Paige (N. Y.), 58; Farwell *v.* Murphy, 2 Wis. 533; Green *v.* Dixon, 9 Wis. 532; McCall *v.* Yard, 7 N. J. Eq. (1 Stockt.) 358; Peabody *v.* Roberts, 47 Barb. (N. Y.) 91; Brainard *v.* Cooper, 10 N. Y. (6 Seld.) 356; Redfield *v.* Hart, 12 Iowa, 355; Knowles *v.* Rablin, 20 Iowa, 10; Heimstreet *v.* Winnie, 10 Iowa, 430; Cooper *v.* Martin, 1 Dana (Ky.), 23.

[2] Peabody *v.* Roberts, 47 Barb. 91; Anson *v.* Anson, 20 Iowa, 55; Ten Eyck *v.* Casad, 15 Iowa, 524.

[3] Walsh *v.* Rutgers F. Ins. Co. 13 Abb. (N. Y.) Pr. 33; Vanderkemp *v.* Shelton, 11 Paige (N. Y.), 28.

[4] In the earlier cases in England the distinction between parties indispensable to the suit, and proper parties to it, was not always taken. In Bishop of Winchester *v.* Beavor, 3 Ves. Jun. 314, it was objected by the second mortgagees, who were parties to a suit for the foreclosure of a first mortgage, that a judgment creditor was not joined. At first the Master of the Rolls, afterwards Lord Alvanley, inclined against the objection; "stating the inconvenience that would arise from the necessity of making all the judgment creditors of the mortgagor parties. After argument he said: "The usual and common practice, almost without exception, is to make all incumbrancers parties. If I lay down that it is absolutely necessary, I arm a man with a shield to ward off a foreclosure. But the question is, whether it is not proper in this case. I think it would be too much to refuse it. Where there is no affectation of delay, that I can see, I do not think the general point so clear as to determine it upon this case. I hope the court is not bound to insist upon all incumbrancers being parties; but I am perfectly satisfied that in this case it is by much the least evil to order the cause to stand over till this single incumbrancer is made a party." Mr. Calvert, in his Treatise on Parties, p. 186, says: "The general practice will not of necessity bind a mortgagee, who for particular reasons, such as costs and the small value of the security, desires to exclude from the record particular mortgagees. There is no rule to the effect that there shall be only one foreclos-

bring all subsequent parties in interest before the court; but as the law now stands it is not his absolute duty to do so; or in other words, the court will not compel the plaintiff, on the motion of any other party, to bring in those who have subsequent liens, however desirable it may be to make a final settlement of the rights of all persons interested in the property.

1396. All parties in interest should be joined, inasmuch as it is true the proper object of a bill in equity to foreclose a mortgage is to cut off all rights subsequent to the mortgage.[1] The rights of any one so interested not made a party to the bill are not affected by the decree of foreclosure and the sale under it, but he may redeem as before the sale.[2] The proceeding is not *in rem*, but *in personam*.

ure bill of the same estate, for there may, according to the acknowledged practice, be as many foreclosures as there are mortgagees; provided the suits are filed in a series commencing with the last mortgagee. It is said that a mortgagor ought not to be liable to successive suits; yet he will be if the suits were instituted in that series."

[1] Bloomer *v.* Sturges, 58 N. Y. 168; Kay *v.* Whittaker, 44 N. Y. 565; McGown *v.* Yerks, 6 Johns. (N. Y.) Ch. 450; Ensworth *v.* Lambert, 4 Johns. (N. Y.) Ch. 605; Smith *v.* Chapman, 4 Conn. 344; Vanderkemp *v.* Shelton, 11 Paige (N. Y.), 28; Haines *v.* Beach, 3 Johns. (N. Y.) Ch. 459; Judson *v.* Emanuel, 1 Ala. 598; Swift *v.* Edson, 5 Conn. 531; Goodman *v.* White, 26 Conn. 322; Chase *v.* Abbott, 20 Iowa, 154; Wright *v.* Howell, 35 Iowa, 288; Manufacturing Co. *v.* Price, 4 S. C. 338; M'Call *v.* Yard, 3 Stockt. N. J. 58; Caldwell *v.* Taggart, 4 Pet. 190; Hayward *v.* Stearns, 39 Cal. 58; Besser *v.* Hawthorne, 3 Oregon, 129; Armstrong *v.* Pratt, 2 Wis. 299; Rowley *v.* Williams, 5 Wis. 151; Moore *v.* Cord, 14 Wis. 213; Stark *v.* Brown, 12 Wis. 572; Hunt *v.* Acre, 28 Ala. 580; Boykin *v.* Rain, 28 Ala. 332; Doe *v.* McLoskey, 1 Ala. 708; Gaines *v.* Walker, 16 Ind. 361; Proctor *v.* Baker, 15 Ind. 178; Martin *v.* Noble, 29 Ind. 216; Holmes *v.* Bybee, 34 Ind. 262; Hasselman *v.* McKernan, 50 Ind. 441; Coombs *v.* Carr, 55 Ind. 303.

[2] Cockes *v.* Sherman, 2 Freem. 14 (1676). Here were five mortgages of the same land. The fifth mortgagee bought the first three mortgages, and then foreclosed without making the fourth mortgagee a party. Lord Chancellor Finch held that the fourth mortgagee had an equity of redemption. "The fourth mortgagee was not concluded by this decree, being never made a party to it; and although there be a great mischief on one hand that a mortgagee, after a decree against the mortgagor to foreclose him of his equity of redemption, shall never know when to be at rest; for if there be any other incumbrances he is still liable to an account; yet the inconvenience is far greater on the other side, for if a mortgagee, that is a stranger to this decree, should be concluded, he would be absolutely without remedy and lose his whole money, when perhaps a decree may be huddled up purposely to cheat him, and in the mean time (he being paid his interest) may be lulled asleep, and think nothing of it; whereas, on the other hand, there is no prejudice but being liable to the trouble of an account; and if so be that were stated *bonâ fide* between the mortgagor and mortgagee in the suit wherein the decree was obtained, that shall be no more ravelled into, but so long shall stand untouched."

1397. Trustees and beneficiaries. — As a general rule, all persons beneficially interested in the equity of redemption should be made parties to the suit as well as the trustees who hold the legal title. They have an interest in the controvesy adverse to the plaintiff.[1] This was the English rule until it was enacted[2] that the trustees may represent the persons beneficially interested, so that the latter need not be made parties to the suit, unless the court in its discretion orders them to be joined. Under this statute, however, it seems that the court will require that the *cestuis que trust* be made parties where the trustees have not complete power over the estate, or have not in their control funds applicable to the purpose of redemption.[3] Under this general rule persons having a vested remainder in fee in the equity of redemption should be made parties to the bill, though the trustee is made a defendant; and the fact that the trustee executed the mortgage under authority of the court does not excuse omitting them.[4]

1398. When beneficiaries are numerous. — Although as a general rule a nominal trustee cannot be made a defendant alone without joining with him his *cestuis que trust*, this rule will not be adhered to when great inconvenience or expense would be incurred by making them parties. In a case where the trustee represented two hundred and fifty owners or subscribers, it was held that he sufficiently represented them as defendant;[5] and so trustees who represented a large number of bondholders under a second mortgage were held to be the only defendants required in a suit to foreclose a prior mortgage.[6] This exception to the rule applies also

[1] Coles *v.* Forrest, 10 Beav. 552; Calverley *v.* Phelp, Madd. & G. 229; Tylee *v.* Webb, 6 Beav. 557; Goldsmid *v.* Stonehewer, 9 Hare, App. xxxix; 17 Jur. 199; Newton *v.* Earl Egmont, 4 Sim. 574; 5 Ib. 130; Union Bank at Massillon *v.* Bell, 14 Ohio St. 200; Mavrich *v.* Grier, 3 Nev. 52, 57; Delaplaine *v.* Lewis, 19 Wis. 476; Johnson *v.* Robertson, 31 Md. 491; Williamson *v.* Field, 2 Sandf. (N. Y.) Ch. 533; King *v.* McVickar, 3 Sandf. (N. Y.) Ch. 192; Leggett *v.* Mut. Life Ins. Co. 64 Barb. (N. Y.) 23; Rawson *v.* Lampman, 5 N. Y. 456; Nodine *v.* Greenfield, 7 Paige (N. Y.), 544.

[2] 15 & 16 Vict. c. 86, § 42.

[3] Goldsmid *v.* Stonehewer, *supra;* Tudor *v.* Morris, 1 Sm. & Gif. 503. See, also, Young *v.* Ward, 10 Hare, lix; Siffken *v.* Davis, Kay, xxi; Cropper *v.* Mellash, 1 Jur. N. S. 299.

[4] Williamson *v.* Field, 2 Sandf. (N. Y.) Ch. 533.

[5] Van Vechten *v.* Terry, 2 Johns. (N. Y.) Ch. 197. Chancellor Kent said: "It would be intolerably oppressive and burdensome to compel the plaintiffs to bring in all the *cestuis que trust.* The delay and the expense incident to such a proceeding would be a reflection on the justice of the the court."

[6] N. J. Franklinite Co. *v.* Ames, 1 Beas. (N. J.) 507.

where the mortgaged property is held in trust for numerous creditors.[1] The plaintiff, however, should state distinctly and particularly the grounds on which he omits to make the creditors or other persons interested in the matter in controversy parties to the suit.[2] Even a selected number of creditors may sufficiently represent the whole number; but in such case the trustees should be made parties for the protection of the interests of the whole body of creditors.[3]

1399. Trustee. — It has been held in some cases, however, that as the trustee and *cestui que trust* really represent but one interest, and the trustee is the holder of the legal interest, he alone should be made a party to the suit, as he would be the party entitled to redeem. This is especially the case where the trust is for the benefit of creditors.[4]

1400. Equitable interest. — A person having an equitable interest in the mortgaged premises by reason of having advanced money for erecting buildings thereon, and who by agreement with the owner entered into possession of the premises before the making of the mortgage, and continued in possession down to the time of the sale of them under foreclosure suit, should be made a party to the proceedings; otherwise his rights will not be barred. His continued possession is constructive notice of his equitable rights.[5] A person having only a remote or contingent interest, without any estate or lien, may properly be made a party.[6]

1401. Remainder-men. — When there are estates in remainder

[1] Willis *v.* Henderson, 4 Scam. (Ill.) 13; and see Swift *v.* Stebbins, 4 Stew. & Port. (Ala.) 447.

[2] Holland *v.* Baker, 3 Hare, 68.

[3] Holland *v.* Baker, *supra;* Wigram, V. C., in this case said: "I do not doubt that the court does allow a selected number to represent a numerous body of defendants, whose interests are sought to be adversely affected in a suit. Lord Eldon repeatedly said it might be done, if the purposes of justice required it; and Lord Cottenham, in Attwood *v.* Small (not reported, but see 4 Myl. & C. 635), after saying that the right course was to bring all parties before the court, observed, that courts of justice are bound to have regard to the mode in which the affairs of mankind are conducted: and when, in consequence of the mode in which the affairs of mankind are conducted; and when, in consequence of the mode of dealing, it would be impossible to work out justice if the rule requiring all persons to be present were not departed from, it must be relaxed rather than be allowed to stand as an obstruction to justice."

[4] Grant *v.* Duane, 9 Johns. (N. Y.) 591, 612; Willis *v.* Henderson, 5 Ill. (4 Scam.) 13; Paschal's Dig. of Decis. (Texas) §§ 18531, 18533.

[5] De Ruyter *v.* Trustees of St. Peter's Church, 2 Barb. (N. Y.) Ch. 555.

[6] Johnson *v.* Britton, 23 Ind. 105; Parrott *v.* Hughes, 10 Iowa, 459.

or reversion after a life estate in the equity of redemption, it is generally sufficient to bring before the court the first person in being who has a vested estate of inheritance, together with those claiming the life estate, and omitting any who may claim a reversion after such vested estate.[1] Those having merely future contingent interests are not necessary parties, if the person who has the first estate of inheritance is before the court. If the estate is entailed, it is sufficient to make the first tenant in tail *in esse* a party if there are no prior estates.[2] This is upon the principle of representation. "The first tenant in tail," says Lord Camden, "is sufficient; he sustains the interests of everybody: those in remainder are considered ciphers." [3]

But it is not enough to make the persons holding the life interest in the mortgaged premises parties to the bill without joining any one having a remainder in fee; as in case the mortgagor makes a devise of the premises to trustees in trust for his children for life, remainder in fee to his grandchildren: the latter must be made parties in order to cut off their right of redemption. The trustees cannot represent the whole estate.[4]

After the conveyance of lands subject to mortgage in trust for the benefit of children, both those in being and those to be born, all the children *in esse* at the time of the filing of a bill of foreclosure should be made parties. A decree against the trustee alone does not take away their right to redeem.[5]

1402. The mortgagor, if he remains the owner of the equity of redemption, is a necessary party to a foreclosure suit, because without his presence the primary object of the suit, a decree of foreclosure or sale, cannot be obtained.[6] Even if he

[1] Gore' *v.* Stacpoole, 1 Dow, 18, 31; Reynoldson *v.* Perkins, Ambl. 564; Eagle F. Ins. Co. *v.* Cammet, 2 Edw. (N. Y.) Ch. 127; Blount *v.* Earl of Winterton, 1 Harris Ch. Pr. 29; Cholmondeley *v.* Clinton, 2 Jac. & Walk. 133; Chappell *v.* Rees, 1 De G., M. & G. 393; Hopkins *v.* Hopkins, 1 Atk. 590; Fishwick *v.* Lowe, 1 Cox, 411; Kerrick *v.* Saffery, 7 Sim. 317; Nodine *v.* Greenfield, 7 Paige (N. Y.), 544.

[2] Yates & Hambly, 2 Atk. 238; Fishwich *v.* Low, 1 Cox, 411; Lloyd *v.* Johnes, 9 Ves. 37; Giffard *v.* Hort, 1 Sch. & Lef. 408; Roscarrick *v.* Barton, 1 Ch. Ca. 218; Platt *v.* Sprigg, 2 Vern. 304; Williamson *v.* Field, 2 Sandf. (N. Y.) Ch. 533.

[3] Reynoldson *v.* Perkins, Ambl. 564.

[4] Leggett *v.* Mut. Life Ins. Co. 64 Barb. (N. Y.) 23, 36.

[5] Clark *v.* Reyburn, 8 Wall. 318.

[6] Story Eq. Pl. § 197; Farmer *v.* Curtis, 2 Sim. 466; Fell *v.* Brown, 2 Bro. Ch. 276; Palk *v.* Clinton, 12 Ves. 48; Caddick *v.* Cook, 32 Beav. 70. In Kay *v.* Whittaker, 44 N. Y. 565, 572, Hunt, J., said, obviously with reference to the case of the mortgagor's still remaining the owner of the equity: "To sustain a foreclosure suit, the mortgagor is a necessary party, and gen-

has wholly parted with his interest in the premises he should be made a party to the bill, if a judgment is sought against him for any deficiency of the debt that may remain after applying to it the proceeds of the sale.[1] Therefore, where the laws provide for a judgment for such deficiency he is always a proper party, though not a necessary one, after he has conveyed his interest, so far as effecting a complete foreclosure of the equity of redemption is concerned. If no personal judgment is sought against the mortgagor, or none can be had, he should not be made a party to the bill after he has ceased to have any interest in the subject of the mortgage.[2]

1403. If the mortgagor retains an interest in the property, such that he may again become possessed of the equity of redemption, he must be made a party; as, for instance, if there has been a voidable or irregular sale of his equity under a subsequent mortgage.[3] It would seem that until he has actually voided the sale the purchaser might properly be regarded as the necessary party to the suit, because he would be the apparent holder of the equity of redemption; and that the mortgagor would be a proper party only by reason of his possible right to redeem. Although a mortgagor has entered into a binding contract to convey the property, he is not a necessary party until he actually makes the conveyance. The person contracting to purchase is, however, a proper party; and the court may even order him to be brought in before entering a decree.[4]

erally the only necessary one. Others may be joined if it is desired to cut off their interests, as a wife, a subsequent purchaser, or subsequent mortgagee. They are not indispensable parties. The action is good without them; and the only effect of their absence is that their interests are not affected by the proceeding." In a few cases the mortgagor has been spoken of as a proper party merely. Semple *v.* Lee, 13 Iowa, 304; Sumner *v.* Coleman, 20 Ind. 486. But it is conceived that this is an inaccuracy in the use of terms.

[1] Delaplaine *v.* Lewis, 19 Wis. 476; Bigelow *v.* Bush, 6 Paige (N. Y.), 343; Shaw *v.* Hoadley, 8 Blackf. 165; Van Nest *v.* Latson, 19 Barb. (N. Y.) 604; Heyman *v.* Lowell, 23 Cal. 106; Michigan Ins. Co. *v.* Brown, 11 Mich. 265; Worthington *v.* Lee, 2 Bland, 678; Moore *v.* Starks, 1 Ohio St. 369; Cord *v.* Hirsch, 17 Wis. 403; Semple *v.* Lee, 13 Iowa, 304; Johnson *v.* Monell, 13 Iowa, 300; Murray *v.* Catlett, 4 Greene (Iowa), 108; Williams *v.* Meeker, 29 Iowa, 292, 294; Huston *v.* Stringham, 21 Iowa, 36; Chester *v.* King, 2 N. J. Eq. (1 Green) 405; Vreeland *v.* Loubat, Ib. 104.

[2] Brown *v.* Stead, 5 Sim. 535; Swift *v.* Edson, 5 Conn. 531; Broome *v.* Beers, 6 Conn. 198; Wilkins *v.* Wilkins, 4 Port. (Ala.) 245; Inge *v.* Boardman, 2 Ala. 331; Stevens *v.* Campbell, 21 Ind. 471; Burkham *v.* Beaver, 17 Ind. 367.

[3] Merritt *v.* Phenix, 48 Ala. 87; and see also Huston *v.* Stringham, 21 Iowa, 36.

[4] Crooke *v.* O'Higgins, 14 How. (N. Y.) Pr. 154.

In some cases it has been held that the circumstance that the mortgagor has conveyed the premises by a warranty deed gives him a sufficient interest in a suit to foreclose the mortgage to authorize his being made a party defendant.[1] But these decisions are not generally sustained. The mortgagor, however, is presumed to retain his interest in the property, and to be a necessary party, unless the bill discloses a state of facts which render the making of him a party unnecessary.[2]

The grantor in an absolute deed, intended as a mortgage, is not a necessary party when the defeasance is executed to another, to secure whose debt the deed was made. He is a proper party, though generally he may be omitted. If the complainant, however, has any doubt of the validity of the conveyance, he may very properly join him to set the doubt at rest.[3]

1404. The mortgagor, after he has conveyed the whole of the premises mortgaged, is not a necessary party to the suit; nor indeed is he a proper party, unless a personal judgment for any deficiency there may be after applying the property to the debt is sought against him.[4] The decree is conclusive upon the title without him.[5] He is, however, so far a proper party in case a personal judgment against him is sought, that this judgment is conclusive against him in any future litigation between the same parties, and he may take an appeal from it.[6] If he is not made a party, and no one under him has become personally liable for the debt, the decree, after finding the amount of the debt, can merely direct a sale of the premises in satisfaction of the debt.[7] And such would be the case, also, when the debt is barred by the statute of limitations, although he is made a party.[8]

1405. If the mortgagor has conveyed away only a portion of the premises, and remains owner of the residue, he may still be regarded as a necessary party, and the purchaser of the part only a proper one, because a decree against the mortgagor alone would

[1] Gifford *v.* Workman, 15 Iowa, 34; Huston *v.* Stringham, 21 Iowa, 36.

[2] Kunkel *v.* Maskell, 36 Md. 390.

[3] Weed *v.* Stevenson, Clarke (N. Y.) Ch. 166.

[4] Miller *v.* Thompson, 34 Mich. 10.

[5] Soule *v.* Albee, 31 Vt. 142; Drury *v.* Clark, 16 How. (N. Y.) Pr. 424; Daly *v.* Burchell, 13 Abb. N. S. (N. Y.) Pr. 264; Stevens *v.* Campbell, 21 Ind. 471; Johnson *v.* Monell, 13 Iowa, 300; Belloc *v.* Rogers, 9 Cal. 123; Swift *v.* Edson, 5 Conn. 153; Delaplaine *v.* Lewis, 19 Wis. 476; Cord *v.* Hirsch, 17 Wis. 532.

[6] Andrews *v.* Stelle, 22 N. J. Eq. 478.

[7] Jones *v.* Lapham, 15 Kans. 540.

[8] Mich. Ins. Co. *v.* Brown, 11 Mich. 265. See, also, Rhodes *v.* Evans, Clarke (N. Y.) Ch. 168.

have something to act upon, and a decree against the purchaser of a portion of the property is not indispensable, though the portion sold to him would remain unaffected if he was not made a party.[1]

A sale of the mortgagor's interest upon execution does away with the necessity of making him a party as effectually as a voluntary sale would.

A partition of the estate subsequent to the mortgage affects the mortgagee so far only that he must see that all persons who become interested in the property by the partition shall be made parties to the proceedings to foreclose.

1406. The holder of the equity of redemption by purchase from the mortgagor is, of course, an essential party to a bill to bar the equity by foreclosure.[2] Equally with the mortgagor he is unaffected by any foreclosure proceeding to which he is not made a party.[3] If he has assumed the payment of the mortgage, there is a double reason for making him a party.[4]

1407. If the purchaser from the mortgagor has assumed the payment of the mortgage debt, and thereby made himself personally responsible to the holder of the mortgage, there is less occasion to make the mortgagor a party. As between him and the purchaser, the land itself and the purchaser are primarily responsible, and the mortgagor is a surety only. But if the mortgagee does not care to obtain a personal judgment against him, there is no occasion to make him a party to the proceedings.[5] In

[1] Douglass *v.* Bishop, 27 Iowa, 214, 216; Mims *v.* Mims, 35 Ala. 23; Hull *v.* Lyon, 27 Mo. 570.

[2] Reed *v.* Marble, 10 Paige (N. Y.), 409; Peto *v.* Hammond, 29 Beavan, 91; Maule *v.* Duke of Beaufort, 1 Russ. 349; Nichols *v.* Randall, 5 Minn. 304, 308; Wolf *v.* Banning, 3 Minn. 202, 204; Hall *v.* Nelson, 14 How. Pr. 32; Cord *v.* Hirsch, 17 Wis. 403; Hall *v.* Huggins, 19 Ala. 200; Ohling *v.* Luitjens, 32 Ill. 23; St. John *v.* Bumpstead, 17 Barb. (N. Y.) 100; Williamson *v.* Field, 2 Sandf. (N. Y.) Ch. 533; Watson *v.* Spence, 20 Wend. (N. Y.) 260; Hall *v.* Nelson, 23 Barb. (N. Y.) 88; Moore *v.* Cord, 14 Wis. 213; Stark *v.* Brown, 12 Wis. 572; Hodson *v.* Treat, 7 Wis. 263; State Bank of Wis. *v.* Abbott, 20 Wis. 570; Lenox *v.* Reed, 12 Kans. 223; Bludworth *v.* Lake, 33 Cal. 265; Skinner *v.* Buck, 29 Cal. 253; Boggs *v.* Hargrave, 16 Cal. 559; De Leon *v.* Higuera, 15 Cal. 483; Luning *v.* Brady, 10 Cal. 265; Childs *v.* Childs, 10 Ohio St. 339; Schmeltz *v.* Garey, 49 Tex. 49.

Contrary to the entire list of authorities and to sound principle it was held in Sumner *v.* Coleman, 20 Ind. 486; and in Semple *v.* Lee, 13 Iowa, 304; Cline *v.* Inlow, 14 Ind. 419, that the owner, though a proper is not a necessary party defendant.

[3] Barrett *v.* Blackmar, 47 Iowa, 565.

[4] Bishop *v.* Douglass, 25 Wis. 696; Green *v.* Dixon, 9 Wis. 532. See this last case for a general statement of the doctrine as to parties.

[5] Daly *v.* Burchell, 13 Abb. (N. Y.) Pr. N. S. 264, 268; Paton *v.* Murray, 6 Paige (N. Y.), 474; Van Nest *v.* Latson, 19 Barb. (N. Y.) 604; Shaw *v.* Hoadley, 8

other words, he is not a necessary party though a proper one.[1] There is, however, no real distinction, as regards the propriety of making the mortgagor a party, between the case in which he has simply conveyed the land incumbered by the mortgage and that where the purchaser has assumed the payment of the mortgage debt. The mortgagor is just as much bound to the holder of the mortgage in one case as in the other; and whether he remains the principal debtor, or by a sale of the property another assumes his place as debtor, and he becomes only a surety, he continues to the same extent liable to a personal judgment for a deficiency.

1408. Intermediate purchasers who have conveyed their interest in the property should not be made parties to the bill, unless they have assumed the payment of the mortgage, and thus become personally liable for the debt, when they may be made parties for the purpose of obtaining a personal judgment against them.[2] If they have not made themselves responsible for the mortgage debt by assuming it, having no longer any interest in the land, they cannot properly be joined as defendants.[3]

In the earlier cases it was held that a mesne purchaser who had assumed the mortgage debt, and subsequently conveyed the premises to another on like terms, was not liable to the holder of the mortgage, by reason of his assuming it, because there was no privity of contract between them; that he was liable only to his grantor, and therefore that in a suit to foreclose he could not be made a party and adjudged liable to pay any deficiency.[4] But now the rule is quite general that one who has thus assumed the debt is directly liable for it to the holder of the mortgage.[5]

1409. Tenants in common and several owners of the equity of redemption must be joined. The mortgagee is entitled to receive the whole of his money together, if compelled to go into

Blackf. (Ind.) 165; Burkham *v.* Beaver, 17 Ind. 367.

[1] McArthur *v.* Franklin, 15 Ohio St. 485, 509; S. C. 16 Ib. 193. In Delaplaine *v.* Lewis, 19 Wis. 476, Cole, J., said: "According to the weight of modern authority, the rule seems to be settled that the mortgagor who has absolutely parted with the equity of redemption is not a *necessary*, though he is a very proper, defendant in an action to foreclose the mortgage."

[2] Pomeroy's Remedies and Remedial Rights, § 337; Hall *v.* Yoell, 45 Cal. 584. See Lockwood *v.* Benedict, 3 Edw. (N. Y.) 472.

[3] Scarry *v.* Eldridge (Ind. 1878), 7 Cent. L. J. 418.

[4] Lockwood *v.* Benedict, *supra*.

[5] Burr *v.* Beers, 24 N. Y. 178; Crawford *v.* Edwards, 33 Mich. 354, and cases cited.

court at all. Therefore, in case the mortgage was made by tenants in common, he is entitled to a foreclosure of the whole estate, and cannot be compelled to receive the share of the debt due from one of them and foreclose against the other for his share.[1] Such would also be the case when two estates have been mortgaged together, and the equities have subsequently passed into different hands. Neither would he be allowed to foreclose against the owner of one estate, without making the owner of the other a party also,[2] unless there were special equities in favor of the estate exempted.

If the mortgaged estate has subsequently been divided and sold in distinct lots, all the purchasers must be made parties to make an effectual foreclosure of the whole estate.[3] If the mortgage to be foreclosed covers two distinct estates, one of which is subsequently incumbered by a second mortgage, and the other is sold to a third person, both the second mortgagee and the purchaser, as well as the original mortgagor who retains the equity of one of the estates, must be made parties to the bill; for the mortgage cannot be foreclosed upon one estate alone, unless there be special equities, if the owner of it objects. The purchaser of a part can redeem only by paying the whole debt.[4]

1410. Objection that the owner of the equity is not made a party to the bill may be taken by the mortgagor in his answer.[5] But objection that the mortgagor is not made a party defendant cannot be made by a purchaser of the premises who is a party to the suit.[6] An objection to the non-joinder of a defendant must be taken by demurrer or answer, or will be deemed to have been waived.[7] After a foreclosure sale the mortgagor cannot object to a confirmation of it on the ground that he was not made a party, and that in consequence the equity of redemption was not extinguished, and the premises brought much less than they would otherwise have brought.[8]

1411. Purchaser pendente lite. — As a general rule where the equity of redemption has been assigned or attached after the commencement of proceedings in equity to foreclose, the purchaser or

[1] Frost *v.* Frost, 3 Sandf. (N. Y.) Ch. 188.

[2] Cholmondeley *v.* Clinton, 2 J. & W. 134; Palk *v.* Clinton, 12 Ves. 48, 59.

[3] Peto *v.* Hammond, 29 Beav. 91. See Ireson *v.* Denn, 2 Cox, 425.

[4] Douglass *v.* Bishop, 27 Iowa, 214.

[5] Peto *v.* Hammond, 29 Beav. 91; Drury *v.* Clark, 16 How. (N. Y.) Pr. 424; Hall *v.* Nelson, 14 How. (N. Y.) Pr. 32.

[6] Williams *v.* Mecker, 29 Iowa, 292, 294.

[7] See Davis *v.* Converse, 35 Vt. 503.

[8] Cord *v.* Hirsch, 17 Wis. 408.

attaching creditor need not be brought before the court; because he is regarded as having notice of the plaintiff's rights and his proceedings to enforce them, and can claim against him only such title and rights as the owner of the equity had at the time of the purchase or attachment.[1] Provision is made in many states for the filing of a notice of the pendency of the suit in the registry or with the clerk of the court in the county where the mortgage is recorded;[2] and where the recording of such notice is required, third persons are not affected with notice, unless the record is made as required.[3] But in the absence of such statutory provisions, the proceedings in court being of public record, parties are regarded as having constructive notice of the proceedings and take subject to them. As a practical matter, if a mortgagor could, after the commencement of the suit, create new parties at his pleasure, by making new incumbrances upon the property, whose presence in court would be necessary to the foreclosure of their rights, there might be no end to the suit.[4] The doctrine of *lis pendens* does not rest upon the presumption of notice, but upon reasons of public policy; and applies where there is no possibility that there was actual notice of the pendency of the suit.[5]

The *lis pendens* commences upon the serving of the subpœna, if the bill has been actually filed.[6] The pendency of the suit creates the notice. When the cause is ended by a final decree, there is no longer any *lis pendens* by which parties can be further affected with notice.[7] Under a statute providing for the filing of

[1] Garth *v.* Ward, 2 Atk. 175; Metcalfe *v.* Pulvertoft, 2 Ves. & Bea. 205; Gaskell *v.* Durdin, 2 Ball & Bea. 169; Lloyd *v.* Passingham, 16 Ves. 66; Parkes *v.* White, 11 Ves. 236; McPherson *v.* Housel, 13 N. J. Eq. 299; Watt *v.* Watt, 2 Barb. (N. Y.) Ch. 371; Jackson *v.* Losee, 4 Sandf. (N. Y.) Ch. 381; Zeiter *v.* Bowman, 6 Barb. (N. Y.) 133; Griswold *v.* Miller, 15 Ib. 520; Cleveland *v.* Boerum, 23 Ib. 201; 27 Ib. 252; 3 Abb. Pr. 294; Lyon *v.* Sanford, 5 Conn. 548; Paston *v.* Eubank, 3 J. J. Marsh. (Ky.) 43; Hull *v.* Lyon, 27 Mo. 570; Ostrom *v.* McCann, 21 How. (N. Y.) Pr. 431; Stokes *v.* Maxwell, 59 Ga. 78.

[2] Rev. Stat. S. C. 1873, p. 600; Code, Va. 1873, p. 1166; Code, W. Va. 1870, pp. 667, 668; 2 R. S. N. Y. 174, § 43; and Code, § 132; Abadie *v.* Lobero, 36 Cal. 390.

[3] This notice is unnecessary as to all parties in interest before the court. Totten *v.* Stuyvesant, 3 Edw. (N. Y.) Ch. 500. It does not affect those having paramount rights. Curtis *v.* Hitchcock, 10 Paige (N. Y.), 399.

[4] Garth *v.* Ward, 2 Atk. 175; Bishop of Winchester *v.* Paine, 11 Ves. 194, 197; Brooks *v.* Vt. Cent. R. R. Co. 14 Blatchf. 463, 471.

[5] Newman *v.* Chapman, 2 Rand. (Va.) 93.

[6] Anon. 1 Vern. 318.

[7] Worsley *v.* Earl of Scarborough, 3 Atk. 392; Self *v.* Madox, 1 Vern. 459.

a *lis pendens*, creditors obtaining judgments afterwards, even before service of the summons and complaint upon the owner of the equity of redemption, are cut off without being made parties.[1]

If pending the bill the mortgagor's interest in the land is sold on execution, the plaintiff is not bound to amend his complaint so as to make the purchaser a party.[2]

It is not within the power of the mortgagor, pending a foreclosure suit, by contract with a mechanic, and without the consent of the mortgagee, to create an incumbrance upon the property which could in any wise affect the rights of the mortgagee as they might be declared by the final decree.[3]

Purchasers and creditors attaching, *pendente lite*, have no right to come in by petition and make defence in the suit.[4] They can only make themselves parties to the suit by filing a bill to protect their rights.[5]

1412. If the deed to the purchaser of the equity has not been recorded at the time of the bringing of the bill, he is nevertheless a necessary party if the plaintiff has in any way either actual or constructive notice of it;[6] but if the purchaser has not recorded his deed, and the plaintiff has no notice of it, the foreclosure is binding upon the purchaser equally as if he were made a party.[7] If the deed be recorded before the service of summons upon the mortgagor, the grantees are necessary parties, although notice of the pendency of the action had been filed before the recording of the deed.[8] Such notice becomes operative only upon the service of the summons. If the mortgage was not recorded at a time of a subsequent sale of the equity of redemption, a purchaser without notice is not a necessary party, nor even a proper

[1] Fuller *v.* Scribner 16 Hun (N. Y.), 130. And see Weeks *v.* Tomes, Ib. 349.

[2] Bennett *v.* Calhoun Ass'n, 9 Rich. (S. C.) Eq. 163.

[3] Hards *v.* Conn. Mut. Life Ins. Co. (U. S. C. C. N. D. Ill. 1878) 8 Ins. L. J. 9; 6 Reporter, 420.

[4] Davis *v.* Conn. Mut. Life Ins. Co. 84 Ill. 508.

[5] People's Bank *v.* Hamilton Manuf. Co. 10 Paige (N. Y.), 481; Loomis *v.* Stuyvesant, Ib. 490.

[6] Drury *v.* Clark, 16 How. (N. Y.) Pr. 424; Ehle *v.* Brown, 31 Wis. 405; Pettibone *v.* Edwards, 15 Wis. 95. See Hodson *v.* Treat, 7 Wis. 263; Green *v.* Dixon, 9 Wis. 532.

[7] Leonard *v.* N. Y. Bay Co. 28 N. J. Eq. 192; Kipp *v.* Brandt, 49 How. (N. Y.) Pr. 358; Woods *v.* Love, 27 Mich. 308; Aldrich *v.* Stephens, 49 Cal. 676; Houghton *v.* Marion, 7 Wis. 244; and see Davenport *v.* Turpin, 41 Cal. 100.

[8] Farmers' Loan & Trust Co. *v.* Dickson, 17 How. (N. Y.) Pr. 477.

one ; because his rights are paramount and cannot be affected by the suit.[1]

1413. A mere occupant of the land without title should not be made a party to the bill,[2] unless by statute this be required.[3] If, however, he has any rights, these are not prejudiced by the decree,[4] and for this reason, and that the title may be quieted, an occupant or a tenant in possession, although he has no legal interest in the premises, has sometimes been regarded as a proper party to the bill.[5] A lessee for a term of years of the mortgagor, having a right to redeem, should be made a party to a suit to foreclose.[6]

1414. Mortgagor's heirs. — If the mortgagor has died seised of the mortgaged estate, his heirs at law are indispensable parties. It is not enough to make his executor or administrator a party to it.[7] The personal representative has no title to the land ; though in some states he has a temporary right of possession.

The heirs of a mortgagor who has sold the mortgaged premises in his lifetime have no interest in the land, and, therefore, should

[1] Cline *v.* Inlow, 14 Ind. 419 ; Mims *v.* Mims, 1 Humph. (Tenn.) 425.

[2] Far. & Mil. Bank, 26 Wis. 196 ; Suiter *v.* Turner, 10 Iowa, 517.

[3] Buckner *v.* Sessions, 27 Ark. 219; Fletcher *v.* Hutchinson, 25 Ark. 30.

[4] Suiter *v.* Turner, 10 Iowa, 517.

[5] Cruger *v.* Daniel, McMull. Eq. (S. C.) 157, 196.

[6] Lockhart *v.* Ward, 45 Tex. 227 ; Averill *v.* Taylor, 8 N. Y. 44.

[7] Story Eq. Pl. §§ 194, 196 ; Farmer *v.* Curtis, 2 Sim. 466 ; Fell *v.* Brown, 2 Bro. Ch. 276 ; Palk *v.* Clinton, 12 Ves. 48, 58 ; Duncombe *v.* Hansley, 3 P. Wms. 333 (n.) ; Bradshaw *v.* Outram, 13 Ves. 234 ; Bissell *v.* Marine Co. 55 Ill. 165 ; Ohling *v.* Luitjens, 32 Ill. 23 ; Britton *v.* Hunt, 9 Kans. 228 ; Lane *v.* Erskine, 13 Ill. 501 ; Harvey *v.* Thornton, 14 Ill. 217 ; Moore *v.* Starks, 1 Ohio St. 369 ; Graham *v.* Carter, 2 Hen. & M. 6 ; Mayo *v.* Tomkies, 6 Munf. 520; McIver *v.* Cherry, 8 Humph. (Tenn.) 713; Stark *v.* Brown, 12 Wis. 572 ; Averett *v.* Ward, Busbee Eq. (N. C.) 192 ; Worthington *v.* Lee, 2 Bland Eq. (Md.) 678 ; Muir *v.* Gibson, 8 Ind. 187 ; Miles *v.* Smith, 22 Mo. 502 ; Kiernan *v.* Blackwell, 27 Ark. 235 ; Hunt *v.* Acre, 28 Ala. 580 ; Erwin *v.* Ferguson, 5 Ala. 158 ; Shiveley *v.* Jones, 6 B. Mon. 274 ; Bollinger *v.* Chouteau, 20 Mo. 89 ; Burton *v.* Lies, 21 Cal. 87 ; Abbott *v.* Godfroy, 1 Mich. 178 ; Byrne *v.* Taylor, 46 Miss. 95 ; Bryce *v.* Bowers, 11 Rich. Eq. (S. C.) 41 ; Wood *v.* Moorhouse, 1 Lans. (N. Y.) 405 ; Simms *v.* Richardson, 32 Ark. 297.

A statute forbidding an action to be brought against an executor or administrator, within one year from the date of his appointment, does not apply to a bill for foreclosure against the heir of a deceased mortgagor. Slaughter *v.* Foust, 4 Blackf. (Ind.) 379.

In **Georgia** the personal representative of the mortgagor is a necessary party. Magruder *v.* Offut, Dudley (Ga.), 227 ; Dixon *v.* Cuyler, 27 Ga. 248.

In **South Carolina**, under the former equity practice, it was said that the personal representative should be joined. Mitchell *v.* Bogan, 11 Rich. 686, 711.

In **Missouri**, since the Code of 1845, the personal representative of the mortgagor is a necessary party. Miles *v.* Smith, 22 Mo. 502 ; Perkins *v.* Woods, 27 Mo. 547.

not be made parties to the bill, unless the validity of the conveyance is controverted.[1] If the complainant seeks for a personal judgment or for an account, the personal representative should be joined with the heirs;[2] but if no such judgment be sought the personal representatives should not be joined.[3] If the debt is barred, or for any reason is not payable out of the personal assets, the occasion for joining the personal representative no longer exists.

The heirs of the mortgagor or other person who has died seised of the estate covered by the mortgage are necessary parties, just as the deceased mortgagor or owner would have been if the action had been brought in his lifetime, being indispensable to the rendering of any judgment of foreclosure, or for the sale of the property. The court of its own motion, even if no one who is a party to the suit makes objection that they are not joined, will order them to be brought in as defendants.[4] If the heirs are beyond the jurisdiction of the court the cause cannot be proceeded with.[5] Under a statute by which the personal representative of a deceased person succeeds to the lands, as well as the personal property, for the purpose of administration, the executor or administrator becomes the necessary party in the foreclosure of a mortgage, in place of the heir.[6]

The possibility that the mortgage debt may have been paid in whole or in part is no occasion for joining the personal representative. The heir can take advantage of such payment, if any there be, and must establish the fact himself by proofs. Yet, under the statutes of several of the states, it is held that the personal representative is a proper party at least, and should be admitted as such upon his motion;[7] that he has the same right to be made

[1] Medley *v.* Elliott, 62 Ill. 532; Douglas *v.* Soutter, 52 Ill. 154; Wilkins *v.* Wilkins, 4 Port. (Ala.) 245.

[2] Daniel *v.* Skipwith, 2 Bro. C. C. 155; Bradshaw *v.* Outram, 13 Ves. 235; Erwin *v.* Ferguson, 5 Ala. 158; Leonard *v.* Morris, 9 Paige, 90; Bigelow *v.* Bush, 6 Paige, 345; Huston *v.* Stringham, 21 Iowa, 36; Darlington *v.* Effey, 13 Iowa, 177; Drayton *v.* Marshall, Rice (S. C.) Eq. 373; Inge *v.* Boardman, 2 Ala. 331; Belloc *v.* Rogers, 9 Cal. 123; Harwood *v.* Marye, 8 Cal. 580; Carr *v.* Caldwell, 10 Cal. 380.

[3] Hibernia Savings & Loan Soc. *v.* Herbert (Cal. Jan. 1879), 7 Reporter, 458.

[4] Story's Eq. Pl. § 196; Muir *v.* Gibson, 8 Ind. 187.

[5] Fell *v.* Brown. 2 Bro. C. C. 276; Farmer *v.* Curtis, 2 Sim. 466.

[6] Harwood *v.* Marye, 8 Cal. 580.

[7] Miles *v.* Smith, 22 Mo. 502; Darlington *v.* Effey, 13 Iowa, 177; Hunt *v.* Acre, 28 Ala. 580; Dixon *v.* Cuyler, 27 Ga. 248; Mitchell *v.* Bogan, 11 Rich. S. C. 686.

a party that the mortgagor had;[1] and especially when the mortgagee seeks to charge the personal estate of the deceased, of which the administrator is the representative, on account of the inadequacy of the security.[2]

1415. Heir of purchaser. — The same rules as to making the heirs of the mortgagor parties to the foreclosure suit apply as well to the heirs of a purchaser, or of a judgment creditor.[3]

1416. Heir of partner. — If one of two or more joint mortgagors, who are partners, dies pending a suit for foreclosure, it is not necessary to make his heirs or personal representatives parties to it, because the title vests in the surviving partners, who alone are the proper defendants.[4]

1417. Although the mortgage be of a term of years the mortgagor's heirs are alone interested, and therefore must be made parties to a bill to foreclose the mortgage.[5]

1418. Devisees. — Under the same rule a devisee of the mortgagor, whether in trust or beneficially, is a necessary party in respect to so much of the equity of redemption as has been given to him.[6] If the whole equity has been devised to him, the heir having no interest in it is not a proper party; but if the title of the devisee under the will be disputed by the heir, then he should be joined as well;[7] and since the probate of a will may within a limited period be impeached, a plaintiff who proceeds without joining the heirs does so at the risk of their afterwards proving to be the real parties in interest.[8] If the mortgagor by his will charges the equity of redemption with the payment of an annuity, the annuitant should be made a party.[9]

1419. Legatees. — When legacies are made a special charge upon the mortgaged estate the legatees should be made parties.[10]

A guardian of minor heirs need not be joined with them as a defendant in the suit.[11]

1420. Mortgagor's wife. — It is usual to make the wife who

[1] Huston *v.* Stringham, 21 Iowa, 36.

[2] Darlington *v.* Effy, 13 Iowa, 177.

[3] Milroy *v.* Stockwell, 1 Ind. 35.

[4] Cullum *v.* Batre, 1 Ala. 126; and see Jones *v.* Parsons, 25 Cal. 100.

[5] Bradshaw *v.* Outram, 13 Ves. 235; Cholmondeley *v.* Clinton, 2 Jac. & W. 135.

[6] Coles *v.* Forrest, 10 Beav. 552; Graham *v.* Carter, 2 Hen. & M. (Va.) 6; Mayo *v.* Tomkies, 6 Munf. (Va.) 520.

[7] Earl of Macclesfield *v.* Fitton, 1 Vern. 168; Lewis *v.* Nangle, 2 Ves. Sen. 430; Ambl. 150.

[8] Hunt *v.* Acre, 28 Ala. 580.

[9] Hunt *v.* Fownes, 9 Ves. 70.

[10] Batchelor *v.* Middleton, 6 Hare, 78; McGown *v.* Yerks, 6 Johns. (N. Y.) Ch. 450.

[11] Alexander *v.* Frary, 9 Ind. 481.

has joined in the execution of the mortgage a party. But no objection can be taken by the defendant that she is not joined; the only consequence is that if her right of dower becomes fixed and absolute, she may then redeem.[1] It is questioned in some cases whether it is necessary to join the wife in order to cut off her inchoate right of dower,[2] on the ground that this right is not any real interest in the land. But generally this inchoate right of dower is regarded as right in the land created for her benefit, which attaches as soon as her husband is seised of it, although it is at the time and until his death only a contingent or possible one. This inchoate right is therefore as much entitled to protection as the right, when it is absolute. The want of harmony between the decisions in this matter is in large part to be accounted for by the statutes of several states which have radically changed the common law of dower. In all those states in which the common law doctrine remains unchanged, when the wife of a mortgagor has joined in the execution of a mortgage, the rule is general that she should be joined as a party when it is desired to bar her rights by the decrée of foreclosure or sale.[3]

The wife having no separate estate in the property at the time of the foreclosure, but only a possibility of dower upon the death of the husband leaving her surviving, some authorities hold that when she is made a party to the foreclosure suit a personal service of the summons upon her is not necessary; that it is suffi-

[1] Powell *v.* Ross, 4 Cal. 197.

[2] In Denton *v.* Nanny, 8 Barb. 618, Brown, J., said: "I find it nowhere expressly adjudged that a wife is a necessary party to a bill of foreclosure in order to extinguish her inchoate right of dower. Bell *v.* Mayor of N. Y. 10 Paige, 49; Eslava *v.* Le Pretre, 21 Ala. 504; Cary *v.* Wheeler, 14 Wis. 281; but see Foster *v.* Hickox, 38 Wis. 408; Thornton *v.* Pigg, 24 Mo. 249; Riddick *v.* Walsh, 15 Mo. 519, 538; Powell *v.* Ross, 4 Cal. 197. This case, however, is overruled by later cases in this state. See below.

[3] Foster *v.* Hickox, 38 Wis. 408; Moomey *v.* Maas, 22 Iowa, 380; Chase *v.* Abbott, 20 Iowa, 154; Burnap *v.* Cook, 16 Iowa, 149; Sargent *v.* Wilson, 5 Cal. 504; Revalk *v.* Kraemer, 8 Cal. 66; Kohner *v.* Ashenauer, 17 Cal. 578; Anthony *v.* Nye, 30 Cal. 401; Marks *v.* Marsh, 9 Cal. 96; Burton *v.* Lies, 21 Cal. 87; Tadlock *v.* Eccles, 20 Tex. 782; Wisner *v.* Farnham, 2 Mich. 472; Wright *v.* Langley, 36 Ill. 381; Johns *v.* Reardon, 3 Md. Ch. 57; Leonard *v.* Villars, 23 Ill. 377; Denniston *v.* Potts, 19 Miss. 36; Byrne *v.* Taylor, 46 Miss. 95; Watt *v.* Alvod, 25 Ind. 533; Martin *v.* Noble, 29 Ind. 216; Chambers *v.* Nicholson, 30 Ind. 349; Mills *v.* Van Voorhies, 28 Barb. (N. Y.) 125; S. C. 20 N. Y. 412; Merchants' Bank *v.* Thomson, 55 N. Y. 7, 11. This matter is fully discussed in McArthur *v.* Franklin, 15 Ohio St. 485; S. C. 16 Ohio St. 193.

cient to serve it upon the husband only; and that he is bound to appear for her, and if he does not she may be defaulted as if personally served.[1] Her right is regarded as a mere incident to her husband's title. It would seem, however, that process should issue against her. Though she be made a party to the suit, a summons issued against, and served on the husband alone, does not, according to most authorities, bind her in any way, or even authorize the husband to appear and act for her; and the doctrine stated above seems to be generally repudiated.[2]

1421. If the wife did not join her husband in his mortgage in release of her dower, she should still be made a party to the bill if there is a defence to the claim, either by reason of a subsequent release, or because the mortgage was given to secure the payment of purchase money, and is not subject to dower.[3] In such cases the right is subordinate to the mortgage, and is barred if she be made a party. There are cases in conflict with this rule, proceeding upon the theory that the wife in such case has no interest in the land, or any equity of redemption, and is therefore barred by the decree, although not made a party.[4] If the claim be a paramount one, and in no way subject to the mortgage, it cannot then be barred by the decree, and she should not be made a party to the suit.[5] But if she has not joined in the mortgage, and there is no defence to her claim, she is not a proper

[1] Foote *v.* Lathrop, 53 Barb. (N. Y.) 183; affirmed in 41 N. Y. 358; Watson *v.* Church, 10 S. C. (N. Y.) 3 Hun, 80; Eckerson *v.* Vollmer, 11 How. (N. Y.) Pr. 42; Lathrop *v.* Heacock, 4 Lans. (N. Y.) 1; White *v.* Coulter, 1 Hun (N. Y.), 359. In Ferguson *v.* Smith, 2 Johns. (N. Y.) Ch. 139, Chancellor Kent gives as the reason for the rule that service of a subpœna against husband and wife is good if made on the husband alone, that the husband and wife are one person in law, and the husband is bound to answer for both. Perhaps this reason was better formerly than now. As regards the matter of service upon the wife in a foreclosure suit to bar her right of dower, the fact that this is no existing claim, and is an interest resulting from the marital relations, seems to be the ground taken in the recent decisions for the rule that service upon the husband alone is good.

[2] McArthur *v.* Franklin, 15 Ohio St. 485; S. C. 16 Ohio St. 193; Union Bank at Massillon *v.* Bell, 14 Ohio St. 200. See Denton *v.* Nanny, 8 Barb. (N. Y.) 624; Mills *v.* Van Voorhies, 20 N. Y. 415.

[3] Mills *v.* Van Voorhies, 20 N. Y. 412; reversing S. C. 23 Barb. (N. Y.) 125; Wheeler *v.* Morris, 2 Bosw. (N. Y.) 524; Heth *v.* Cocke, 1 Rand. (Va.) 344; Foster *v.* Hickox, 38 Wis. 408.

[4] Fletcher *v.* Holmes, 32 Ind. 497; Etheridge *v.* Vernoy, 71 N. C. 184–186.

[5] Brackett *v.* Baum, 50 N. Y. 8; Merchants' Bank *v.* Thomson, 55 N. Y. 7; Kittle *v.* Van Dyck, 1 Sandf. Ch. 76; Bell *v.* Mayor of N. Y. 10 Paige, 49; Mills *v.* Van Voorhies, 20 N. Y. 412; Mavrich *v.* Grier, 3 Nev. 52.

party to the bill, as her rights would not be affected if she was made a party.[1]

1422. In those states where the common law doctrine of dower is changed, and husband and wife are made wholly independent of each other as to their rights of property, the wife is not a necessary party.[2] If she has no interest and makes no claim of interest, she should not be made a party.[3] The wife of the mortgagor who has released her interest in the mortgage, and then joined her husband in conveying the equity of redemption to a purchaser, can have no possible interest in the land, and therefore is not a proper defendant. Of course, if the mortgaged estate be the separate property of a married woman, she is then owner of the equity of redemption, and as such is a necessary party.[4]

The defendant cannot take the objection that his wife, who joined in the execution of the mortgage, is not joined as a party.[5]

1423. Wife's homestead. — If the premises mortgaged are subject to a homestead right, the wife should be made a party.[6] If, however, the mortgage was given to secure the purchase money and the wife did not join in it, she is not a necessary party by reason of the homestead right; such a mortgage is valid and not subject to the homestead right.[7]

1424. Husband. — In an action to foreclose a mortgage executed by husband and wife on the separate estate of the wife, the husband is a necessary and proper co-defendant, both by reason of his interest in the land and his personal liability on the note.[8] But in those states where the interests of husband and wife are made completely separate and independent as to the property they respectively own, there is no good reason for joining the husband in such case unless he has become personally responsible

[1] Baker *v.* Scott, 62 Ill. 86; Sheldon *v.* Patterson, 55 Ill. 507; Merchants' Bank *v.* Thomson, 55 N. Y. 7; S. C. Abb. L. J. 426; Lewis *v.* Smith, 9 N. Y. 502; S. C. 11 Barb. 152; Moomey *v.* Maas, 22 Iowa, 380.

[2] Miles *v.* Smith, 22 Mo. 502; Thornton *v.* Pigg, 24 Mo. 249; Powell *v.* Ross, 4 Cal. 197.

[3] Stevens *v.* Campbell, 21 Ind. 471.

[4] Hill *v.* Edmonds, 5 De G. & S. 603.

[5] Powell *v.* Ross, 4 Cal. 197.

[6] Sargent *v.* Wilson, 5 Cal. 504; Revalk *v.* Kraemer, 8 Cal. 66; Moss *v.* Warner, 10 Cal. 296.

[7] Amphlett *v.* Hibbard, 29 Mich. 298. Christiancy, J., said: "We see no substantial ground for requiring her to be made a party, nor can we see any such substantial benefit to arise from such requirement as would counterbalance the embarrassments which would arise from such a rule."

[8] Wolf *v.* Banning, 3 Minn. 202; Mavrich *v.* Grier, 3 Nev. 52.

for the debt, and a personal judgment is sought against him;[1] and of course when not a necessary party himself, his heirs or personal representatives are not necessary parties to a suit brought after his death.[2]

1425. All subsequent mortgagees as well as other incumbrancers should be made parties to the action, or they may afterwards redeem; but they are not necessary parties.[3] The assignees of subsequent mortgagees are parties as necessary as the original mortgagees.[4] If the entire interest is assigned, the mortgagee is no longer a proper party, but the assignee becomes such in his place.[5] The assignee in bankruptcy of the subsequent mortgagee must be made a party to the suit, or he will have the right to redeem.[6]

1426. A mortgagee who has assigned the mortgage, although he has not indorsed the note, is not *primâ facie* a necessary party;[7] nor is he, although the assignment shows that he assigned the mortgage as collateral security.[8] But when he has assigned the mortgage merely as collateral security, it is desirable, at least,

[1] Somerset, &c. Savings Ass'n. *v.* Camman, 11 N. J. Eq. (3 Stock.) 382; Thornton *v.* Pigg, 24 Mo. 249; Riddick *v.* Walsh, 15 Mo. 538.

[2] Somerset, &c. Sav. Ass'n *v.* Camman, *supra.*

[3] Peabody *v.* Roberts, 47 Barb. (N. Y.) 91; Arnot *v.* Post, 6 Hill (N. Y.), 65; Waller *v.* Harris, 7 Paige (N. Y.), 167; Carpentier *v.* Brenham, 40 Cal. 221; Gower *v.* Winchester, 33 Iowa, 303; Newcomb *v.* Dewey, 27 Iowa, 381; Street *v.* Beal, 16 Iowa, 68; Chase *v.* Abbott, 20 Iowa, 154; Heimstreet *v.* Winnie, 10 Iowa, 430; Anson *v.* Anson, 20 Iowa, 55; Johnson *v.* Harmon, 19 Iowa, 56; Donnelly *v.* Rusch, 15 Iowa, 99; Semple *v.* Lee, 13 Iowa, 304; Ten Eyck *v.* Casad, 15 Iowa, 524; Crow *v.* Vance, 4 Iowa, 434; Veach *v.* Schaup, 3 Iowa, 194; Bates *v.* Ruddick, 2 Iowa, 423. See this last case for a full discussion of the point. In Tennessee it is held that subsequent mortgagees are bound, though not made parties, if there was no collusion between the parties to the bill, or other special ground of equity. Rowan *v.* Mercer, 10 Humph. 359; Rogers *v.* Holyoke, 14 Minn. 220; Vanderkemp *v.* Shelton, 11 Paige, 28; Carpentier *v.* Brenham, 40 Cal. 221; S. C. 50 Cal. 549; Kenyon *v.* Shreck, 52 Ill. 382; Wiley *v.* Ewing, 47 Ala. 418; Brown *v.* Nevitt, 27 Miss. 801; Vanderveer *v.* Holcomb, 17 N. J. Eq. 87; Atwater *v.* West, 28 N. J. Eq. 361; Gould *v.* Wheeler, 28 N. J. Eq. 541; Webb *v.* Maxan, 11 Tex. 678; Hayward *v.* Stearns, 39 Cal. 55, 60; Davenport *v.* Turpin, 43 Cal. 597, 601; Carpentier *v.* Williamson, 25 Cal. 161; Schadt *v.* Heppe, 45 Cal. 433, 437; Pattison *v.* Shaw, 6 Ind. 377; Mack *v.* Grover, 12 Ind. 254; Meredith *v.* Lackey, 16 Ind. 1; Murdock *v.* Ford, 17 Ind. 52; McKernan *v.* Neff, 43 Ind. 503; Cooper *v.* Martin, 1 Dana (Ky.), 25; Roney *v.* Bell, 9 Ib. 4; Leonard *v.* Groome, 47 Md. 499.

[4] Swift *v.* Edson, 5 Conn. 531; Vanderkemp *v.* Shelton, 11 Paige, 28; S. C. Clarke, Ch. 351.

[5] Pullen *v.* Heron Min. Co. 71 N. C. 567.

[6] Avery *v.* Ryerson, 34 Mich. 362.

[7] Walker *v.* Bank of Mobile, 6 Ala. 452; Western Reserve Bank *v.* Potter, 1 Clarke (N. Y.), 432.

[8] Woodruff *v.* Depue, 14 N. J. Eq. 168.

that he should be made a party; because, if not assigned for its full value, he has still an interest in it; and he may in fact be able to show that the debt for which he has assigned the mortgage has been paid, and that he is really the only one beneficially interested in the security.[1] The better practice, therefore, is to make the assignor of the mortgage a party, whenever it appears either from the assignment or otherwise that he has still an interest in the security.[2]

Except by reason of his personal liability, a mortgagee who has assigned the mortgage absolutely, and indorsed the note, is not a proper defendant in a suit to foreclose the mortgage. The action should be against the mortgagor without joining him, for, though he is liable to the holder of the mortgage as indorser, and might be joined with the maker in a suit on the note, he has nothing to do with the mortgaged property, and cannot be a party to the foreclosure suit.[3] But where a personal judgment may be had against any one liable for the mortgage debt, such mortgagee could be joined for that purpose.[4]

1427. Assignee of note. — In those states where the transfer of the note or bond secured by the mortgage is held to carry with it the mortgage security, the holder of the note, though he has no formal assignment of the mortgage, should be made a party to the bill.[5] In accordance with this principle, after a mortgage has been assigned by an indorsement upon it, without an indorsement of the note or bond secured by it, the assignor remains the real holder of the mortgage, and is a necessary party.[6] In several states there are statutes requiring the assignor to be made a party "when the thing in action is not assignable by indorsement," or when it is not a negotiable instrument. Under these provisions the holder of a mortgage note transferred by indorsement, or by delivery when payable to bearer, may be made a party without

[1] Bard *v.* Poole, 12 N. Y. 495.

[2] § 1375; Whitney *v.* McKinney, 7 Johns. (N. Y.) Ch. 144; Kittle *v.* Van Dyck, 1 Sandf. (N. Y.) Ch. 76; Bloomer *v.* Sturges, 58 N. Y. 168, 175; Ackerson *v.* Lodi Branch R. R. Co. 28 N. J. Eq. 542.

[3] Sands *v.* Wood, 1 Iowa, 263.

[4] Nichols *v.* Randall, 5 Minn. 304, 308; Andrews *v.* Gillespie, 47 N. Y. 487; Christie *v.* Herrick, 1 Barb. (N. Y.) Ch. 254; Ward *v.* Van Bokkelen, 2 Paige (N. Y.), 289; and see Delaware Bank *v.* Jarvis, 20 N. Y. 266.

[5] Burton *v.* Baxter, 7 Blackf. (Ind.) 297.

[6] Holdridge *v.* Sweet, 23 Ind. 118; Bell *v.* Schrock, 2 B. Mon. (Ky.) 29.

the assignor;[1] but if the mortgage debt be evidenced by a bond or non-negotiable note, which is transferred by delivery, although the mortgage is formally assigned, the assignor is a necessary party.[2] A mortgagee who has assigned a negotiable note without a formal assignment of the mortgage is not a necessary party.[3]

If the mortgage secures several notes which have been assigned and are held by different persons, to a suit by one holder to enforce the mortgage the holders of the other notes should be made parties.[4]

1428. Upon the death of a junior mortgagee his personal representative is a proper party to a bill by the prior mortgagee to foreclose. His heir has no interest in the mortgage.[5]

1429. After default. — Incumbrancers who have been made parties to the bill, and suffered default, cannot complain that one of them was not duly served with process, when afterwards it appears that the property has sold for a sum less than the amount due upon the mortgage. The defendant not served can alone take advantage of the want of service.[6]

1430. After payment. — A junior mortgagee after receiving full satisfaction for his debt, though not made a party to a foreclosure of a prior mortgage, has no right of redemption which he can exercise himself or transfer to another; and the rule is the same in case his mortgage is in the form of an absolute conveyance, and he has upon payment conveyed the premises at the request of the mortgagor to a third party. He cannot invest the mortgagor or a third party with a right to redeem when he himself has ceased to have that right.[7]

1431. The only right of a junior mortgagee, who has not been made a party to the foreclosure of a prior mortgage, is to redeem the property from that mortgage. It does not matter that on the sale of the property under the foreclosure of the prior mortgage there was a surplus which, with the consent of the mortgagor, was paid to a third mortgagee who was made a party to the suit, and the property subsequently depreciated so that there

[1] Gower *v.* Howe, 20 Ind. 396.

[2] Holdridge *v.* Sweet, 23 Ind. 118; French *v.* Turner, 15 Ind. 59.

[3] Wilson *v.* Spring, 64 Ill. 14.

[4] Delespine *v.* Campbell, 45 Tex. 628.

[5] Whitla *v.* Halliday, 4 Drury & Warren, 267; Shaw *v.* McNish, 1 Barb. (N. Y.) Ch. 326.

[6] Montgomery *v.* Tutt, 11 Cal. 307.

[7] McHenry *v.* Cooper, 27 Iowa, 134.

was no value above the first mortgage. The middle mortgagee has no claim upon the surplus. Whether the property has increased or depreciated in value since the sale under the first mortgage does not affect his right to redeem, which is the only right he has in the matter.[1]

1432. A guarantor of the mortgage debt is not a proper party to the foreclosure suit, because he is not liable to the holder of the mortgage, until the remedy against the mortgagor and the property mortgaged is first exhausted.[2] But where the court has power to decree the payment of any deficiency there may be after the sale of the property, as well against a third person as against the mortgagor, then a mortgagee who has assigned his mortgage and guaranteed the payment of it, or any other person who has become a guarantor or surety of the debt, is a proper,[3] though not a necessary,[4] party to a suit to foreclose the mortgage. One who has guaranteed that the mortgage debt is collectible is in this way a proper party.[5] But in all cases when the collateral undertaking is strictly one of guaranty, the judgment should provide that execution should not issue against the guarantor until an execution against the persons primarily liable has been returned unsatisfied.[6] Upon a guaranty made by the holder of a mortgage upon assigning it, that the mortgaged premises are sufficient to pay the debt, and that the mortgage is collectible, the guarantor is not liable unless the assignee makes a diligent foreclosure of the mortgage. Any unreasonable delay, such as the lapse of nine months after the maturity of an instalment of the mortgage, to foreclose it will discharge the guarantor.[7]

A guarantor of "collection" is not generally a proper party,[8] because no obligation arises on the part of such guarantor until there is found to be a deficiency after foreclosure;[9] nor is a surety

[1] McKernan *v.* Neff, 43 Ind. 503.

[2] Newton *v.* Earl of Egmont, 4 Sim. 574; Gedye *v.* Matson, 25 Beav. 310; Joy *v.* Jackson, &c. Co. 11 Mich. 155; Borden *v.* Gilbert, 13 Wis. 670.

[3] § 1710; Jarman *v.* Wiswall, 24 N. J. Eq. 267; Bristol *v.* Morgan, 3 Edw. (N. Y.) Ch. 142; Rushmore *v.* Miller, 4 Ib. 84; Jones *v.* Stienbergh, 1 Barb. (N. Y.) Ch. 250; Luce *v.* Hinds, Clarke (N. Y.), 453.

[4] Cases above cited, and Stiger *v.* Mahone, 24 N. J. Eq. 426, 430.

[5] Leonard *v.* Morris, 9 Paige (N. Y.), 99; Curtis *v.* Tyler, Ib. 432.

[6] Leonard *v.* Morris, *supra.*

[7] Northern Ins. Co. of N. Y. *v.* Wright (N. Y. Ct. of Appeals, 1879), 19 Alb. L. J. 378; Craig *v.* Parkis, 40 N. Y. 181.

[8] Baxter *v.* Smack, 17 How. (N. Y.) Pr. 183.

[9] Johnson *v.* Shepard, 35 Mich. 115.

for the provision by the mortgagor of a sinking fund to be invested for the payment of the mortgage.[1]

A state which has indorsed the bonds of a railroad company, secured by a statutory mortgage, is not considered a necessary party to a suit to foreclose the mortgage.[2]

1433. Collateral to guaranty. — And the courts have gone still further in this direction, and have held that the maker of a collateral obligation taken by the guarantor as further security for the amount due on the mortgage is a proper party to the suit, because the holder of the mortgage is entitled in equity to the benefit of the collateral undertaking, and to have a decree against him if the proceeds of the sale are insufficient.[3]

The heirs and devisees of a deceased guarantor cannot, however, be made parties to the suit for the purpose of reaching real estate that has come to them from the deceased to satisfy an anticipated deficiency in the mortgaged property to meet the debt.[4]

1434. Indorser of note. — Except for the purpose of obtaining a personal judgment against one who is merely an assignor or indorser of a promissory note secured by the mortgage, he is neither a necessary nor proper party to an action against the maker to foreclose the mortgage. The indorser is concluded by the amount for which the property is sold under the decree of foreclosure, and cannot afterwards object in a suit against himself on his indorsement that he was not a party to the foreclosure suit.[5] And so also the maker of a note which is secured by a mortgage executed by another is not a necessary party, and if no personal claim is made against him, is not a proper party to the suit to foreclose.[6]

1435. Joint mortgages. — In a bill to foreclose by one of two joint mortgagees, the other mortgagee must be made a party,

[1] Joy *v.* Jackson, &c. Co. 11 Mich. 155.

[2] Young *v.* R. R. Co. (C. C. of U. S. Ala.) 3 Am. L. T. R. (N. S.) 9.

[3] Curtis *v.* Tyler, 9 Paige (N. Y.), 432.

[4] Leonard *v.* Morris, 9 Paige (N. Y.), 90.

[5] Markel *v.* Evans, 47 Ind. 326. In California it is held that it is proper under the practice act to join the mortgagor and indorser as defendants. Eastman *v.* Turman, 24 Cal. 379.

[6] Kearsing *v.* Kilian, 18 Cal. 491; and see Deland *v.* Mershon, 7 Iowa, 70; Wilkinson *v.* Daniels, 1 Greene (Iowa), 179; De Cottes *v.* Jeffers, 7 Fla. 284. See, however, Davis *v.* Converse, 35 Vt. 503, where the principal was held a proper party, by reason of the accounting before the master, and the court for that reason might compel his being brought in if the objection was made in season.

either by joining in the bill, or if he declines to do this, as a respondent.[1] But where a mortgage secures several notes falling due at different times, in a suit by the holder of one of the notes to foreclose the mortgage, the holder of a note subsequently falling due is not a necessary party; but if not made a party, of course his rights are unaffected by the decree and sale.[2] The mortgagee not made a party may subsequently file his complaint to foreclose, and may make the debtor and all the other mortgagees parties, and may contest the claims of the latter.[3] If there be two mortgages, one collateral to the other, both mortgagors should be made parties to the bill to foreclose, for the mortgagor in the collateral mortgage has a right to redeem, and it is his interest that his property should be called upon to satisfy as small a deficiency as possible.[4]

1436. Judgment creditors. — A subsequent judgment creditor of the mortgagor having a lien upon the property should be made a party to the proceedings, otherwise he may redeem after the sale, but he is not a necessary defendant.[5] He cannot, however, have the sale set aside by petition in the foreclosure suit.[6] There has been some question as to what acts are necessary to constitute this lien, and when it accrues. A judgment is generally a lien from the time it is docketed, and no execution or sale is necessary to establish a title to redeem. The judgment itself carries with it the right of redemption, and therefore makes the creditor a necessary party.[7] In case the mortgage be for foreclosure money, no lien by subsequent judgment would attach, and therefore the creditor is without remedy whether made a party or not.[8] And so also if the judgment creditor has not perfected the proceedings under his judgment, so as to have made it a charge upon the debtor's land, he is not a proper party.[9] A creditor of the mortgagor who has attached the equity of redemp-

[1] Hopkins *v.* Ward, 12 B. Mon. (Ky.) 185.

[2] Harris *v.* Harlan, 14 Ind. 439; Murdock *v.* Ford, 17 Ind. 52.

[3] Goodall *v.* Mopley, 45 Ill. 355.

[4] Stokes *v.* Clindon, 3 Swanst. 150.

[5] Sharpe *v.* Earl of Scarborough, 4 Ves. 538; Stonehewer *v.* Thompson, 2 Atk. 440; Blagrave *v.* Clunn, 2 Vern. 576; Henry *v.* Smith, 2 D. & War. 390; Adams *v.* Paynter, 1 Coll. 530; Winebrener *v.* Johnson, 7 Abb. N. S. (N. Y.) Pr. 202; Brainard *v.* Cooper, 10 N. Y. 356; Proctor *v.* Baker, 15 Ind. 178; Muir *v.* Gibson, 8 Ind. 187; Gaines *v.* Walker, 16 Ind. 361; not a necessary party.

[6] Pratt *v.* Frear, 13 Wis. 462.

[7] Brainard *v.* Cooper, *supra.*

[8] Person *v.* Merrick, 5 Wis. 231.

[9] Earl of Cork *v.* Russell, L. R. 13 Eq. 210.

tion should be made a party;[1] as also one who has levied an execution upon it, though the time allowed the debtor to redeem has not expired.[2]

A judgment rendered against a person prior to his purchase of land is not generally a lien upon it; and even a mortgage given at the time of the purchase by him for the purchase money would not be affected by it; and upon the foreclosure of such a mortgage, though the judgment creditor be not made a party to the suit, if the property sell for less than the mortgage debt, the purchaser obtains a valid and irredeemable title.[3]

1437. Judgment after decree. — A creditor having a judgment rendered before the sale, but subsequent to the decree, may redeem at any time before the sale by virtue of his lien. But after the sale the right is as effectually barred as if the creditor had been made a party to the proceeding. Neither has such creditor any right to come in by petition, and make defence to the suit.[4]

A creditor holding a judgment rendered prior to the mortgage is not a proper party to a suit to foreclose it.[5]

1438. Bankrupt. —If the owner of the equity of redemption becomes bankrupt, and his estate is assigned under the law, he should not generally be made a party, for he has no longer any right of redemption in it, but his assignee should be made a party in his place.[6] If the bankruptcy occur after the foreclosure suit has been commenced, he should suggest his bankruptcy and move for a continuance of the suit, to await the termination of the proceedings in bankruptcy, when he may plead his discharge if any judgment is sought on his personal liability. The assignee may, however, appear and allow the proceedings to go on, so far as the foreclosure and sale of the property is concerned. But unless the proceedings are continued in the state court upon motion, or are restrained by the bankruptcy court, they may proceed to judgment and sale.[7]

[1] Lyon *v.* Sanford, 5 Conn. 544. See, also, Carter *v.* Champion, 8 Conn. 549. *Contra*, see Nichols *v.* Holgate, 2 Aik. (Vt.) 138.

[2] Bullard *v.* Leach, 27 Vt. 491.

[3] De Saussure *v.* Bollman, 7 S. C. 329.

[4] People's Bank *v.* Hamilton Manuf. Co. 10 Paige (N. Y.), 481.

[5] Hendry *v.* Quinan, 4 Halst. (N. J.) 534.

[6] See §§ **1231–1236**; Kerrick *v.* Saffery, 7 Sim. 317; Lloyd *v.* Lander, 5 Mad. 282; Richards *v.* Cooper, 5 Beav. 304; Anon. 10 Paige (N. Y.), 20; Willink *v.* Morris Canal & Banking Co. 3 Green's Ch. (N. J.) 377.

[7] Eyster *v.* Gaff, U. S. S. Ct. 13 Albany

1439. Prior parties. — Persons having interests in the property prior to the mortgage sought to be foreclosed are neither necessary nor proper parties to the suit; because the only proper object of the proceedings is to bar all rights subsequent to the mortgage. The decree can have no effect upon the rights of parties having priority, whether they are made parties to the action or not.[1]

In some cases prior mortgagees are made parties to the bill, so that the court may with their consent order a sale of the whole estate, and thus make a good and complete title in the purchaser.[2] Sometimes a prior mortgagee is made a party to the suit, with a view to his assenting to a decree for the sale of the whole estate, in which case his mortgage is first paid, and the proceeds then applied to the second mortgage.[3] But it is proper to make the person who holds the prior legal title a party only when his debt is payable, and he is willing to receive payment, and for the purpose of making a sale of the whole title. He is not a necessary party except for such a decree.[4] The court may order a sale sub-

Law J. 272; Lenihan *v.* Hamann, 55 N. Y. 652; Cleveland *v.* Boerum, 23 Barb. (N. Y.) 201.

[1] See § **1440**; Rose *v.* Page, 2 Sim. 471; Shepherd *v.* Gwinnet, 3 Swanst. 151; Richards *v.* Cooper, 5 Beav. 304; Delabere *v.* Norwood, 3 Swanst. 144, n.; Jerome *v.* McCarter, 94 U. S. 734; Weed *v.* Beebe, 21 Vt. 499; Strobe *v.* Downer, 13 Wis. 10; Walker *v.* Jarvis, 16 Wis. 28; Wakeman *v.* Grover, 4 Paige (N. Y.), 23; Eagle Fire Co. *v.* Lent, 6 Paige (N. Y.), 637; Lewis *v.* Smith, 11 Barb. (N. Y.) 152; S. C. 9 N. Y. 502; Kay *v.* Whittaker, 44 N. Y. 565; Hancock *v.* Hancock, 22 N. Y. 568; Brundage *v.* Domestic & For. Miss. Soc. 60 Barb. (N. Y.) 204; Hoppock *v.* Rumsey, 28 N. J. Eq. 413; Post *v.* Mackall, 3 Bland (Md.), 495; Hall *v.* Hall, 11 Tex. 547; Tome *v.* Loan Co. 34 Md. 12; Bogey *v.* Shute, 4 Jones Eq. (N. C.) 174; Young *v.* R. R. Co. 3 Am. L. T. R. (N. S.) 91; Hagan *v.* Walker, 14 How. 37; Summers *v.* Bromley, 28 Mich. 125; Wurcherer *v.* Hewitt, 10 Mich. 453; Comstock *v.* Comstock, 24 Mich. 39; Pattison *v.* Shaw, 6 Ind. 377; Wright *v.* Bundy, 11 Ind. 398; Murphy *v.* Farwell, 9 Wis. 102. See, however, contrary to authority, Standish *v.* Dow, 21 Iowa, 363; Heimstreet *v.* Winnie, 10 Iowa, 430; Morris *v.* Wheeler, 45 N. Y. 708. The latter case in direct conflict with other decisions of the same court.

[2] Champlin *v.* Foster, 7 B. Mon. (Ky.) 104; Clark *v.* Prentice, 3 Dana (Ky.), 468. In this case the court say that the interest of the mortgagor and of the mortgagee, as well as the security of purchasers, renders this the proper course; that if each of several successive mortgagees could have a decree and sale, there would be no confidence in judicial sales. Persons *v.* Alsip, 2 Ind. 67; Troth *v.* Hunt, 8 Blackf. 580.

[3] Vanderkemp *v.* Shelton, 11 Paige (N. Y.), 28; Ducker *v.* Belt, 3 Md. Ch. 13; Rucks *v.* Taylor, 49 Miss. 552; Miller *v.* Finn, 1 Neb. 254.

[4] Jerome *v.* McCarter, 94 U. S. 734; Hagan *v.* Walker, 14 How. (U. S.) 37. In this case Judge Curtis explains and limits the statement of Chief Justice Marshall in Finley *v.* Bank of the United

ject to a prior incumbrance; and unless the mortgagee with paramount title expressly consents to a sale of the mortgaged estate, the sale must be made subject to his mortgage;[1] and no portion of the proceeds of the sale can be applied in payment thereof.[2]

If a sale of the entire property be decreed in a suit to which the senior mortgagee is not a party, he may enjoin the execution of the decree;[3] though in such case the decree would be void so far as it might affect his rights.

When one is made a party to a foreclosure suit as the holder of a subsequent mortgage, and such party is also the owner of mortgages prior to that of the plaintiff, he may answer in the action and ask to have such prior mortgages paid out of the proceeds of sale before applying any portion thereof to the satisfaction of the plaintiff's mortgage.[4]

When a subsequent mortgagee makes a prior mortgagee a party to the suit, as well as the owner of the equity, his proceeding, so far as the former is concerned, becomes a bill to redeem.[5] The prior mortgage stands unaffected by the proceeding, although the holder of it suffers default,[6] and may be foreclosed against one who purchases at the foreclosure sale under the junior mortgage.[7] A prior judgment lien stands unaffected in the same way, although the creditor was made a party to the suit to foreclose a junior mortgage.[8]

On the same principle in a suit to foreclose a mortgage made of a title bond, the vendor is not a proper party. He cannot be affected by the decree.[9] A prior mortgagee cannot properly be

States, 11 Wheat. 306, that the prior mortgagee is a necessary party. And see White *v.* Holman, 32 Ark. 753.

[1] Langton *v.* Langton, 7 De G., M. & G. 30. In England the practice upon a sale under a subsequent mortgage is to make the mortgagee with paramount title a party to the suit, if it is desired to sell the whole estate, when he is required to consent to such sale, or to refuse it at once; and then if he concurs, a sale of the whole estate is decreed; otherwise the decree is for a sale subject to his security. Wickenden *v.* Rayson, 6 De G., M. & G. 210. See, also, Delabere *v.* Norwood, 3 Sw. 144, n.; Parker *v.* Fuller, 1 R. & M. 656; Bigelow *v.* Cassedy, 26 N. J. Eq. 557; Potts *v.* N. J. Arms Co. 17 Ib. 518; Gihon *v.* Belleville Co. 3 Halst. (N. J.) Ch. 536.

[2] Bache *v.* Doscher, 67 N. Y. 429; Emigrant Industrial Savings Bank *v.* Goldman (Court of Appeals, N. Y. Nov. 1878), 19 Alb. L. J. 159.

[3] Rucks *v.* Taylor, 49 Miss. 552.

[4] Doctor *v.* Smith, 16 Hun (N. Y.), 245.

[5] Hudnit *v.* Nash, 16 N. J. Eq. 550.

[6] Straight *v.* Harris, 14 Wis. 509; Dawson *v.* Danbury Bank, 15 Mich. 489.

[7] Williamson *v.* Probasco, 4 Halst. (N. J.) Ch. 571.

[8] Frost *v.* Koon, 30 N. Y. 428.

[9] Pridgen *v.* Andrews, 7 Tex. 461.

made a party to a bill to enforce a mechanic's lien; and if made a party and a decree be taken against him by default, it will be set aside.[1]

The usual practice of courts of equity, in cases where persons claiming adversely to the mortgagor have been improperly made defendants, is to order the action to be dismissed as to such defendants, without prejudice to the plaintiff's rights in any other proceeding.[2]

With the consent of the prior mortgagee who has brought a foreclosure suit, a subsequent mortgagee may file a cross-bill for the foreclosure of his mortgage, and the mortgagor cannot object, as it can work no injury to him.[3]

1440. Adverse claimants cannot be made parties to a foreclosure suit for the purpose of litigating their titles. The only proper parties are the mortgagor and mortgagee, and those who have acquired any interests from them subsequently to the mortgage. An adverse claimant is a stranger to the mortgage and the estate. His interests can in no way be affected by the suit, and he has no interest in it. There being no privity between him and the mortgagee, the latter cannot make him a party defendant for the purpose of trying his adverse claim in the foreclosure suit.[4] A bill which makes defendants persons who claim title adversely for the purpose of litigating and settling their rights, is bad for misjoinder and for multifariousness.[5] One who claims under a tax title which became a lien after the mortgage is a

[1] Smith *v.* Schaffer, 46 Md. 573.

[2] Corning *v.* Smith, 6 N. Y. 82; Banning *v.* Bradford, 21 Minn. 308. See, also, Wilkinson *v.* Daniels, 1 Greene (Iowa), 179.

But without dismissing them, their adverse rights may be expressly saved in the decree. San Francisco *v.* Lawton, 18 Cal. 465.

[3] Crocker *v.* Lowenthal, 83 Ill. 579.

[4] § 1445; Frost *v.* Koon, 30 N. Y. 428; Merchants' Bank *v.* Thomson, 55 N. Y. 7; Lewis *v.* Smith, 9 N. Y. 502; Jones *v.* St. John, 4 Sandf. (N. Y.) Ch. 208; Corning *v.* Smith, 6 N. Y. 82; Eagle Fire Co. *v.* Lent, 6 Paige (N. Y.), 635; Holcomb *v.* Holcomb, 2 Barb. (N. Y.) 20; Wilkinson *v.* Green, 34 Mich. 221; Farmers' & Mechanics' Bank *v.* Bronson, 14 Mich. 361; Horton *v.* Ingersoll, 13 Mich. 409; Chamberlain *v.* Lyell, 3 Mich. 448; Banning *v.* Bradford, 21 Minn. 308; Newman *v.* Home Ins. Co. 20 Minn. 422; San Francisco *v.* Lawton, 18 Cal. 465; Bogey *v.* Shute, 4 Jones (N. C.), Eq. 174; Pelton *v.* Farmin, 18 Wis. 222; Lange *v.* Jones, 5 Leigh (Va.), 192; Lyman *v.* Little, 15 Vt. 576; Comley *v.* Hendricks, 8 Blackf. (Ind.) 189; Pattison *v.* Shaw, 6 Ind. 377; Brundage *v.* Domestic & Foreign Missionary Soc. 60 Barb. (N. Y.) 204; Crugan *v.* Minor, 6 Cent. L. J. 354; Dial *v.* Reynolds, 96 U. S. 340; Peters *v.* Bowman (U. S. Supreme Ct. 1878), 11 Chicago L. N. 118; 17 Albany L. J. 132.

[5] Dial *v.* Reynolds, *supra*.

proper party, as the claim is made for an interest in the equity of redemption;[1] but one claiming under a tax deed as a paramount title is not a proper party.[2] Where the description in the mortgage is erroneous, in a bill to foreclose it, a person who owns lands which would be affected by the erroneous description is not a proper party, when it appears that he was never interested in any portion of the premises identified by proof to be those really mortgaged.[3] The holder of the subsequent mortgage in foreclosing it cannot make one claiming adversely to the mortgagor's title a defendant, for the purpose of trying the validity of the adverse claim.[4]

Whether an asserted claim is such an adverse one as to come within the rule depends not upon what is set up in the answer in regard to it, but upon the allegations of the bill and upon the testimony in the case as to the nature of the alleged adverse claim. Should it appear that a defendant has a legal title which, if valid, is adverse and paramount to the claim of both mortgagor and mortgagee, then neither is the foreclosure suit a suitable proceeding, nor a court of equity the appropriate tribunal, in which to settle the question.[5]

But a subsequent purchaser who has procured releases from a former owner merely to perfect his title of record, and under such circumstances as would render it fraudulent for him to set up such conveyances as a title adverse and paramount to that of the mortgagor, may, under proper allegations, be made a party to the bill for foreclosure, and his title may in such suit be declared null and void.[6]

It has been claimed, however, that when one has been made a defendant in a foreclosure suit and has set up by answer a paramount title, and without objections has gone to trial upon that issue, he cannot, if beaten, ask a reversal on the ground that the issue was not properly triable in that action.[7] But the authorities do not sustain this view. All the title a mortgagee can obtain by foreclosure is the title of his mortgagor, and that is the only title that can be considered in the foreclosure suit.[8]

1 Horton *v.* Ingersoll, 13 Mich. 409.

2 Roberts *v.* Wood, 38 Wis. 60.

3 Ramsdell *v.* Eaton, 12 Mich. 117.

4 Corning *v.* Smith, 6 N. Y. 82; Palmer *v.* Yager, 20 Wis. 91.

5 Wilkinson *v.* Green, 34 Mich. 221; Summers *v.* Bromley, 28 Mich. 126.

6 Wilkinson *v.* Green, *supra.*

7 Bradley *v.* Parkhurst, 20 Kans. 462.

8 Per Horton, C. J., in Bradley *v.* Parkhurst, *supra.*

1441. Priority between mortgages. — It has been held, however, that a question of priority between mortgages may be settled in a foreclosure suit upon a first mortgage, by allowing the second mortgagee to intervene and set up the statute of limitations as a bar to the mortgage upon which suit was brought;[1] and in like manner judgment creditors have been allowed to intervene and contest the validity of a mortgage;[2] and a junior mortgagee might perhaps be allowed to make a prior mortgagee a party to the suit upon special allegations of facts, which would give him equitable precedence, or would put the validity of the prior mortgage in issue.[3]

As already noticed, it is a rule of equity adopted also in the several codes, that additional parties may be brought in when a complete determination of the controversy cannot be had without their presence. The application may be made either by the plaintiff or defendant; though practically it is generally made by the former. But the court may of its own motion order in additional parties when without them its decree would be ineffectual and incomplete.[4] Furthermore, in the progress of the suit a third person who has an interest in the matter of the suit may, on his own application, be made a party.[5] In Iowa[6] and California[7] it is provided that any person having an interest in the matter in litigation may of right intervene by petition and become a litigant party. He may act with either party to the suit or adversely to both. This system is an innovation upon the established principles of equity.

In the last named state, in an action to foreclose a mortgage given by a corporation which had become insolvent, certain judgment creditors alleging fraud in the execution of the mortgage and that it was void against the creditors were allowed to intervene.[8]

[1] Lord *v.* Morris, 18 Cal. 482.

[2] Union Bank at Massillon *v.* Bell, 14 Ohio St. 200.

[3] Dawson *v.* Danbury Bank, 15 Mich. 489.

[4] Leonard *v.* Groome, 47 Md. 499.

[5] Dodge *v.* Fuller, 28 N. J. Eq. 578.

[6] Code of Iowa, 1873, §§ 2683–2685.

[7] Code Civil Proced. of California, 1872, § 387. In the latter state the intervenor must obtain leave of court to file his petition.

[8] Stich *v.* Dickinson, 38 Cal. 608. Mr. Justice Crockett said: "The subject matter of the litigation is the note and mortgage, and the right of the plaintiff to have a decree of foreclosure and sale. The intervenor claims as against the plaintiff that he and not the plaintiff is entitled to the decree of foreclosure; and as against the defendant, that the mortgage debt is

So in an action brought to foreclose a mortgage which was barred by the statute of limitations, a subsequent incumbrancer was allowed to intervene and set up the statute as a defence.[1] In an action to foreclose a mortgage on a homestead the mortgagor's wife was allowed to intervene.[2]

1442. New parties who were found to have an interest in the premises may be joined in the bill or in a supplemental one, if application be made within a reasonable time.[3] A suit may be stayed even on final hearing to bring in subsequent mortgagees and incumbrancers who are found to be proper parties. It is not only a detriment to the complainant, but unjust to all other persons interested in the proceeds of the sale, to allow this to be made subject to an outstanding right to redeem, for that invariably prejudices the sale.[4] The want of necessary parties may be objected to by demurrer when the defect appears upon the face of the bill; otherwise objection may be taken by answer.[5] The mortgagor having an interest in the sale, by reason of his personal liability for the debt, may object to the omission of parties necessary to the making of a perfect title.[6] Those who have acquired liens upon the mortgaged property during the pendency of the foreclosure suit, if not allowed to interpose a defence in the name of the defendant, can only make themselves parties to the suit by filing a bill to protect their rights.[7] After adding new parties, the statutory notice of *lis pendens* should be made to conform to the amended bill.[8]

When a person made a party to the suit, on the supposition that he had some interest in the premises subject to the mortgage, claims no such interest, he should make a disclaimer and have the suit dismissed as to himself.[9]

due and unpaid, and that he is entitled to a foreclosure. In this case the intervenor claims the demand in suit, viz., the note and mortgage, and we can perceive no reason founded on the policy of the law which should preclude the settlement of the whole controversy in one action."

[1] Coster *v.* Brown, 23 Cal. 142; Lord *v.* Morris, 18 Cal. 482.

[2] Sargent *v.* Wilson, 5 Cal. 504; Moss *v.* Warner, 10 Cal. 296.

[3] Heyman *v.* Lowell, 23 Cal. 106. See, also, Jones *v.* Porter, 23 Ind. 66. In Alabama this may be done by petition even after decree and sale. Glidden *v.* Andrews, 6 Ala. 190.

[4] Gould *v.* Wheeler, 28 N. J. Eq. 541.

[5] Morris *v.* Wheeler, 45 N. Y. 708.

[6] Hall *v.* Nelson, 14 How. (N. Y.) Pr. 32; Morris *v.* Wheeler, *supra.*

[7] People's Bank *v.* Hamilton Manuf. Co. 10 Paige (N. Y.), 481.

[8] Clark *v.* Havens, Clarke (N. Y.) Ch. 560.

[9] Pelton *v.* Farmin, 18 Wis. 222.

If a defendant be found to be an infant, a guardian *ad litem* should be appointed, though if process be served upon the infant without the appointment of a guardian, and judgment be taken by default, the judgment is not void but voidable.[1]

[1] McMurray *v.* McMurray, 66 N. Y. 175.

CHAPTER XXXII.

FORECLOSURE BY EQUITABLE SUIT.

I. Jurisdiction, and the object of the suit, 1443–1450.
II. The bill or complaint, 1451–1478.
III. The answer and defence, 1479–1575.

1. *Jurisdiction, and the Object of the Suit.*

1443. Jurisdiction. — Courts of equity have inherent original jurisdiction of the subject of mortgages both for the foreclosure and redemption of them. Redemption is purely a matter of equity, and the only remedy is here. Although other remedies are used for the foreclosure of mortgages under different systems of law and practice adopted in different states, yet generally courts of equity are not deprived of jurisdiction by the existence of other remedies. In many states, as already seen, jurisdiction in equity of the foreclosure of mortgages is expressly conferred by statute.[1] When provisions in detail are made on this subject, they are generally founded upon principles and rules of practice already established by courts of equity under the general jurisdiction they have always exercised of the subject; and the powers of these courts are only enlarged and defined by the statutes. But even where systems of foreclosure not derived directly from chancery courts have been adopted, courts of equity, where they have not been superseded by codes of practice which do away with all distinctions between actions at law and in equity, still have concurrent jurisdiction of the subject and are resorted to, if not generally, then in particular instances, for the reason that they afford a more complete and certain remedy.[2] Even the peculiar statutory mortgage of Louisiana, which is a public act before a notary public, and imports a confession of judgment, and under the statutes

[1] See chapter xxx; Byron *v.* May, 2 Chand. (Wis.) 103; State Bank of Ill. *v.* Wilson, 9 Ill. 57; Warehime *v.* Carroll Co. Build. Asso. 44 Md. 512.

[2] Shaw *v.* Norfolk Co. R. R. Co. 5 Gray (Mass.), 162; McCurdy's Appeal, 65 Pa. St. 290; McElrath *v.* Pittsburg & Steubenville R. R. Co. 55 Pa. St. 189.

of that state is enforced at law by a writ of seizure and sale, may be foreclosed in a court of the United States having jurisdiction of the case by a bill in equity.[1]

Although the mortgage contains a power of sale, courts of chancery are not generally deprived of their jurisdiction to foreclose it.[2] It has been stated as a reason why jurisdiction in equity should be retained in such cases, that a mortgagee may be incapable of purchasing at his own sale under the power,[3] though he may at a sale made by an officer under a judgment or decree. Neither does the fact that there is a statutory remedy oust the jurisdiction of a court of equity to enforce a mortgage.[4]

One result of the equitable character of the statutory processes for enforcing mortgages is, that the parties have no right to have the issues tried by a jury; although the court may in its discretion call in the aid of a jury in any case.[5]

1444. Venue. — Actions for foreclosure of mortgages are generally required by statute to be brought in the county where the mortgaged premises or some part thereof are situated. But aside from this requirement, it is not a local action but transitory, and a bill may be brought wherever there is jurisdiction of the parties. The title to the land cannot be investigated.[6] The courts in England regard the right to redeem as a mere personal right, and not as an estate in a proper technical legal sense, and on this ground take jurisdiction there of the foreclosure of land situated in the colonies, when they have jurisdiction of the parties. In those states in this country where the mortgage is considered a mere lien, and the legal estate as remaining in the mortgagor, the decree operates either to deprive the mortgagor of that estate, by vesting it in the mortgagee as by strict foreclosure, or by sale to convey it

[1] Benjamin *v.* Cavaroc, 2 Woods, 168.

[2] Walton *v.* Dody, 1 Wis. 420; Byron *v.* May, 2 Chand. (Wis.) 103; Carradine *v.* O'Connor, 21 Ala. 573; Alabama Life Ins. Co. *v.* Pettway, 24 Ala. 544; Morrison *v.* Bean, 15 Tex. 267; Warehime *v.* Carroll Co. Build. Assoc. 44 Md. 512.

[3] Marriott *v.* Givens, 8 Ala. 694; McGowan *v.* Branch Bank of Mobile, 7 Ala. 823.

[4] Benjamin *v.* Cavaroc, 2 Woods, 168.

[5] Knickerbocker Life Ins. Co. *v.* Nelson, 8 Hun (N. Y.), 21.

[6] Paget *v.* Ede, L. R. 18 Eq. 118; Toller *v.* Carteret, 2 Vern. 494; Broome *v.* Beers, 6 Conn. 198–207; Palmer *v.* Mead, 7 Conn. 149, 157; Kinney *v.* McCleod, 9 Tex. 78; Caufman *v.* Sayre, 2 B. Mon. 202; Owings *v.* Beall, 3 Litt. (Ky.) 103; Grace *v.* Hunt, Cooke (Tenn.), 341; Cole *v.* Conner, 10 Iowa, 299; Finnagan *v.* Manchester, 12 Iowa, 521; and see Varian *v.* Stevens, 2 Duer (N. Y.), 635; Porter *v.* Lord, 4 Ib. 682; Bates *v.* Reynolds, 7 Bosw. (N. Y.) 685.

to the purchaser; and therefore would be regarded as a local action.[1] If a sale of the property is asked for, as this operates *in rem*, jurisdiction is restricted to the local court of the county in which the land lies.[2]

1445. It is not proper in a foreclosure suit to try a claim of title paramount to that of the mortgagor. The only proper object of the suit is to bar the mortgagor and those claiming under him.[3] Whether the claim of title be made under a conveyance by a third party prior to the mortgage or subsequent to it, it is not a proper subject of determination in a foreclosure suit; nor is a claim under a conveyance by the mortgagor made prior to the mortgage.[4] Such adverse claims of title are generally matters of purely legal jurisdiction. A claim under a tax title is one which cannot be considered in a foreclosure suit, unless it affects the equity of redemption.[5] Even if a party having paramount title is made a party and a judgment is entered after a hearing, it will not bind his interest, but will be set aside on application.[6] But questions of priority of lien as between two mortgages by the same mortgagor may properly be determined in a foreclosure of one of them.[7] Questions, too, of priority between the owners of different parcels of land mortgaged together may be determined, and the order in which they shall be sold fixed.[8]

1446. It is proper in a foreclosure suit to determine the

[1] Paget *v.* Ede, L. R. 18 Eq. 118.

[2] Claufman *v.* Sayre, 2 B. Mon. (Ky.) 202. "A mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately, or else call upon the mortgagor to redeem his estate presently, or in default thereof to be forever foreclosed from redeeming the same; and though in the latter case the decree might be supposed to properly act on the person of the mortgagor, in the former case it acts emphatically on the thing mortgaged." Owings *v.* Beall, 3 Litt. (Ky.) 103; and see Chadbourne *v.* Forster, 29 Iowa, 181.

[3] Pelton *v.* Farmin, 18 Wis. 222; Palmer *v.* Yager, 20 Wis. 91; Summers *v.* Bromley, 28 Mich. 125, per Graves, J. "A court of equity is not the appropriate tribunal, nor is a foreclosure suit a suitable proceeding, for the trial of claims to the legal title which are hostile and paramount to the interest and rights and titles of both mortgagor and mortgagee. Such a trial will neither fall in with the nature of the jurisdiction, or the genius or frame of the particular remedy." See, further, Rathbone *v.* Hooney, 58 N. Y. 463; Merchants' Bank *v.* Thomson, 55 N. Y. 7; Brundage *v.* Dom. & For. Miss. Soc. 60 Barb. (N. Y.) 204. §§ **1439, 1440**.

[4] San Francisco *v.* Lawton, 18 Cal. 465.

[5] Kelsey *v.* Abbott, 13 Cal. 609. § **1440**.

[6] Corning *v.* Smith, 6 N. Y. 82; Lewis *v.* Smith, 9 N. Y. 502.

[7] Board of Supervisors of Iowa Co. *v.* Mineral Point R. R. Co. 24 Wis. 93.

[8] N. Y. Life Ins. & Trust Co. *v.* Milnor, 1 Barb. (N. Y.) Ch. 353.

right of the mortgagor to remove a building erected by him on the land and to direct that the land be sold subject to such right. This is incident to the general power and authority of the court to define and describe in its judgment the property to be sold. Such a question should be settled before the sale, so that the sheriff may know what he is selling, and the purchaser may know what he is buying. In the mean time the mortgagor may be enjoined from impairing the security, by removing the building which is presumably a part of the freehold.[1]

1447. A court of equity will prevent an improper use of its process even in a legal way, as, for instance, when it is apparent that the object of the foreclosure suit is not to procure the satisfaction of the debt, but to obtain a different end by coercing the owner of the equity of redemption. This was done in a case where a wife who owned the fee tendered the mortgagee the amount of his debt, and asked for an assignment of the mortgage, which he refused to make, and the evidence showed that the mortgage was being foreclosed in the interest of the husband, in order to force her to settle a suit by her to annul the marriage, and litigation was then pending about other property. As a new mortgage could not be obtained on account of the ligitation, the court ordered that if the mortgagee refused to assign it the proceedings should be stayed.[2]

1448. A trust deed made for the security of all the creditors of the grantor who are not named, and providing for a sale by the trustee only upon request made by a majority of the creditors, should be enforced by a bill in equity under which the necessary parties can be convened, and their rights ascertained and adjusted.[3] The court will in any case undertake the supervision of the execution of the trust. The decree of sale should embody the provisions of the deed in regard to the sale; but these provisions may be altered when necessary, and in such case the sale must be in accordance with the terms of the decree.[4]

1449. In the foreclosure of a title bond the purchaser is treated as a mortgagor for all purposes of the suit. The rights of the parties are the same as those of the parties to a formal mort-

[1] Brown *v.* Keeney Settlement Cheese Association, 59 N. Y. 242.

[2] Foster *v.* Hughes, 51 How. (N. Y.) Pr. 20.

[3] Hudgins *v.* Lanier, 23 Gratt. (Va.) 494.

[4] Michie *v.* Jeffries, 21 Gratt. (Va.) 334.

gage. Persons interested in the property not made parties to the suit are not affected by the decree.[1] As in the case of the foreclosure of a mortgage the plaintiff may have judgment for foreclosure, and for the amount due on the bond at the same time.[2] A decree of foreclosure may be entered under a prayer for general relief, although not specifically asked for.[3] A decree for the sale of the land described in the bond, and payment of the proceeds upon the judgment, may further provide that upon full payment the vendor shall convey the property to the purchaser, by a deed containing all covenants stipulated for in the bond.[4]

If the vendor retaining the legal title assigns a promissory note received in consideration of the sale, the assignee upon non-payment of it may proceed to foreclose in his own name, as if it were a mortgage note.[5]

A mortgage of a lease may be foreclosed by a sale of the lease. The purchaser in such case becomes an assignee of the lease and term, and takes subject to the obligation to pay rent.[6]

1450. A tender of payment not accepted does not prevent the mortgagee's proceeding with a bill to foreclose.[7] There may be questions as to the amount due on the mortgage, and these can be settled and the mortgage enforced for what is actually due only by a foreclosure suit. Even the pendency of a bill by the mortgagor to redeem does not suspend the right to foreclose. The mortgagor, notwithstanding a decree for redemption, may make default when the actual time for payment arrives.[8] In a foreclosure suit, however, the mortgagor is bound to pay the sum that shall be found due, or else to stand foreclosed of his right of redemption. Until the mortgage debt is actually paid off the mortgagee retains all the rights and remedies incident to his mortgage. By statute, however, in some states, a bill must be dismissed upon the defendant's bringing into court at any time before the decree of sale the principal and interest due with costs.[9] Should there

[1] Dukes *v.* Turner, 44 Iowa, 575.

[2] Mullin *v.* Bloomer, 11 Iowa, 360; Merritt *v.* Judd, 14 Cal. 59; Kiernan *v.* Blackwell, 27 Ark. 235; Hartman *v.* Clarke, 11 Iowa, 510; and see Lewis *v.* Boskins, 27 Ark. 61.

[3] Herring *v.* Neely, 43 Iowa, 157.

[4] Wall *v.* Ambler, 11 Iowa, 274. § 235.

[5] Blair *v.* Marsh, 8 Iowa, 144.

[6] Dudley *v.* Grissler, 58 N. Y. 323; Catlin *v.* Grissler, 57 N. Y. 363; Graham *v.* Bleakie, 2 Daly (N. Y.), 55.

[7] See §§ 886-893.

[8] Grugeon *v.* Gerrard, 4 Y. & C. 119.

[9] As in New York: see Allen *v.* Malcolm, 12 Abb. (N. Y.) Pr. N. S. 335; Hartley *v.* Tatham, 1 Keyes (N. Y.), 222; Kortright *v.* Cady, 21 N. Y. 343.

be a disagreement as to costs, the party making the tender may apply to the court for directions as to the amount of them.[1] Although the tender should properly be brought into court, an irregularity in this respect will be considered waived if the answer of the defendant making the tender be accepted and acted upon without objection.[2]

It has been observed in a former chapter that in several states a tender of the amount due on a mortgage discharges the lien, but does not discharge the debt. The consequence of this doctrine is, that upon proof of a tender of the debt together with any costs incurred at the time, an action for foreclosure will be defeated; but as the debt is not discharged a judgment for that may still be entered and enforced;[3] or where the law and equity systems are distinct an action at law may be maintained upon the debt.[4]

2. *The Bill or Complaint.*

1451. General principles. — It is not proposed to set forth except quite briefly the rules and principles upon which a bill in equity to foreclose a mortgage is to be drawn, prosecuted, and defended. Although the more important features of the pleadings are the same wherever this remedy is used, yet in matters of practice there is much diversity in the different states arising from enactments of different systems of procedure, and the adoption of different rules of practice by the courts. As already noticed when treating of the parties to an equitable action for foreclosure, several states[5] have adopted and made applicable to all civil actions alike codes of procedure, in which the equity method of pleading and practice in a simple form is preserved. The special provisions of these codes relating to mortgages are there given. The general theory and form of the pleadings as a whole are determined by provisions that the complaint or petition shall contain "a plain and concise statement of the facts constituting the cause of action without unnecessary repetition;" and "a demand of the relief to which the plaintiff supposes himself entitled. If a recovery of money be demanded, the amount thereof shall be

[1] Morris *v.* Wheeler, 45 N. Y. 708; Pratt *v.* Ramsdell, 16 How. (N. Y.) Pr. 59; Bartow *v.* Cleveland, Ib. 364.

[2] Roosevelt *v.* N. Y. & Har. R. Co. 30 How. (N. Y.) Pr. 226; 45 Barb. (N. Y.) 554.

[3] McCoy *v.* O'Donnell, 2 Thomp. & C. (N. Y.) 671.

[4] As in **New York** before the Code. Mann *v.* Cooper, 1 Barb. (N. Y.) Ch. 185.

[5] See § **1367.**

stated."[1] The answer must contain: "1. A general or specific denial of each material allegation of the complaint (or petition) controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; 2. A statement of any new matter constituting a defence or counter-claim (or set-off), in ordinary and concise language, without repetition."[2] These provisions are merely the essential requisites of a bill and answer in equity; and, therefore, the more important decisions relating to the substance of the pleadings apply in those states in which foreclosure is by a formal bill in a chancery court, and equally in those having these codes of procedure.

1452. The general requisites of the complaint are that it shall allege the execution and delivery of the mortgage and of the note or bond secured by it; the names of the parties to it; the date and amount of it; when and where recorded; a description of the premises, the amount claimed to be due, and the default upon which the right of action has accrued. It must show also that the complainant is entitled to maintain the action, and that the defendants have or claim to have certain interests in the premises or liens upon them. If the plaintiff is not the mortgagee, his right to maintain the action by virtue of an assignment, bequest, or otherwise, must be set forth with reasonable fulness and certainty. The terms and conditions of both the mortgage and of the bond or note secured by it should be set out. This may be done by proper recitals in the complaint itself, or by annexing copies of these instruments, which are referred to in the complaint and made part of it. The relief which is sought should be fully and explicitly stated.[3]

1453. Facts not inconsistent with the bill may be proved. The evidence may in some respect show a different state of facts from that alleged in the bill; and yet this will be sufficient if the facts shown are not inconsistent with the allegations; as, for example, the amount actually due may be shown to be less than the amount alleged to be due.[4]

1454. An allegation of the execution and delivery of the mortgage is a sufficient allegation of its proper execution and of its validity.[5] An allegation of the execution of the mortgage is

[1] See Pomeroy's Remedies, § 433.
[2] Ib. § 583.
[3] See § 1578.
[4] Collins *v.* Carlile, 13 Ill. 254.
[5] Moore *v.* Titman, 33 Ill. 358; McAllister *v.* Plant, 54 Miss. 106.

also sufficient without any averment of title in the mortgagor. He is estopped by his deed from denying his title; and whatever his title may be the mortgage may be foreclosed against him.[1] The possession of the mortgage by the mortgagee duly executed, acknowledged, and recorded, is presumptive evidence of delivery.[2]

The witnessing and acknowledgment of the mortgage where made essential to the validity of it should be alleged; but if the plaintiff be an assignee of the mortgage these facts are not presumably within his knowledge, and he may properly aver them upon information and belief only.[3]

The mortgage and the note or bond secured by it are usually in some manner made part of the complaint. Copies of them may be set out in the complaint or annexed to it. It is not sufficient merely to file the originals or copies with the complaint without referring to them and making them part of it.[4] But it is sufficient, if the bill sets out the substance of the mortgage.[5]

If properly set forth in the complaint the production of the note and mortgage, and proof of service of the summons, is sufficient where no defence is interposed to justify a decree.[6] If the answer admits the execution of the mortgage and note, and does not deny that the amount claimed in the petition is due, there is nothing for the plaintiff to prove.[7]

1455. Proof of execution. — The mortgage and the personal obligation accompanying it, unless admitted, must be proved by competent evidence. If these instruments be attested by a witness, the execution must be proved by him, unless his attendance cannot be procured, or other circumstances make other evidence, such as proof of the handwriting, competent. When the execution is contested by a person who is not a party to the deed, the admission of the mortgagor is not sufficient if the securities are attested by a witness.[8]

1456. The complainant must show by his bill either that

[1] Shed *v.* Garfield, 5 Vt. 39.

[2] Commercial Bank of N. J. *v.* Reckless, 5 N. J. Eq. (1 Halst.) 650.

[3] Fairbanks *v.* Isham, 16 Wis. 118.

[4] Hiatt *v.* Goblt, 18 Ind. 494; Herren *v.* Clifford, 18 Ind. 411. And see Dumell *v.* Terstegge, 23 Ind. 397; Brown *v.* Shearon, 17 Ind. 239; Triplett *v.* Sayre, 3 Dana (Ky.), 590; Harlan *v.* Murrell, Ib. 180.

[5] Cecil *v.* Dynes, 2 Cart. (Ind.) 266.

[6] Whitney *v.* Buckman, 13 Cal. 536; Harlan *v.* Smith, 6 Cal. 173.

[7] Corley *v.* Hobart, 8 Iowa, 358.

[8] Leigh *v.* Lloyd, 35 Beav. 455; Inman *v.* Parsons, 4 Mad. 271; Whyman *v.* Gath, 1 C. L. R. 482.

he is the mortgagee, or that he has legal title to the security by assignment or otherwise. It is not necessary in so many words to aver that the complainant has title to the mortgaged premises; it is sufficient to aver the making of the mortgage.[1] The estate or interest in the land is not in issue. The only questions are whether the mortgage has been properly executed, and the complainant rightfully holds it and may enforce it. The complainant showing *primâ facie* title, it is for the defendant to allege and prove that he has no title; that, for instance, the mortgage has been discharged. The complainant need not anticipate the defence, and set out in his bill the facts which would invalidate the discharge.[2]

1457. Assignee's title. — If the bill be brought by an assignee of the mortgage, the assignment to him should be fully and distinctly alleged. The same technicality in pleading required at law is not necessary in a court of equity; and accordingly where the bill alleges an assignment of the mortgage, but not of the note or bond, it is sufficient if it appears substantially from the bill that the debt belongs to the complainant.[3] But if it does not so appear, a failure to aver that the bond or note was assigned to the plaintiff, or that he is the holder or owner of it, has been held a fatal defect.[4] If, however, the mortgage was given without a bond or other extrinsic written evidence of the debt secured,

[1] Bull *v.* Meloney, 27 Conn. 560. The allegation in this case was that the respondent, to secure the debt described, "did execute to the petitioner a deed of a certain piece of land," described, with the condition.

In Frink *v.* Branch, 16 Conn. 260, 268, Church, J., says: "It is not often, in proceedings of foreclosure, that the title of the mortgage is directly put in issue, or constitutes the principal subject of controversy; although the entire purpose of the plaintiff is, in default of payment, to make a perfect title, which before was qualified; and the ground of his application is, that he has a mortgage title; and without an averment of facts constituting such title, his bill would be defective. It may not be necessary either to allege or prove the precise condition of the title, whether it be in fee or in tail, for life or for years; but it seems to us, as the right of the plaintiff to ask the interference of the court depends upon some title in himself to the land mortgaged, either legal or equitable, that it is incumbent upon him to establish it at least *primâ facie;* and of course the defendant must have a corresponding right to attack it."

[2] Frink *v.* Branch, 16 Conn. 260, 268; Palmer *v.* Mead, 7 Conn. 149, 157; Spear *v.* Hadden, 31 Mich. 265; Cornelius *v.* Halsey, 3 Stockt. (N. J.) 27.

[3] Cornelius *v.* Halsey, 3 Stockt. (N. J.) 27; Buckner *v.* Sessions, 27 Ark. 219. A description of the plaintiff "as assignee" of the mortgagor is not sufficient. The assignment of the estate cannot be implied from this. But *contra*, see Ercanbrack *v.* Rich, 2 Chand. (Wis.) 100; Babbitt *v.* Bowen, 32 Vt. 437.

[4] Hays *v.* Lewis, 17 Wis. 210.

an assignment of the mortgage passes the title to the debt; and a complaint which alleges that the mortgage was given for a part of the purchase money, and sets out the assignment of it to the plaintiff, is sufficient.[1] The bill need not aver the record of the assignment;[2] for there is no legal necessity for it.[3] The fact that the assignee holds the mortgage merely as security does not affect his right to recover, but goes only to limit his interest in the proceeds.[4]

Other liens which the plaintiff may have upon the property he may set out in his complaint and establish beforehand, or may present and establish a claim to the surplus in the same manner as any other person.[5]

1458. A mortgagee having two mortgages upon the same premises may, under the several codes, include both of them in one bill for foreclosure. Two suits being unnecessary, he will be allowed costs in one only.[6] If one mortgage covers only a part of the premises included in the other, suit should be brought in the first place for the foreclosure of the mortgage covering the entire premises, as then a second suit will be unnecessary.[7]

One having two mortgages on the same property may file his bill for the foreclosure of both, although the second of them be not due. If the second mortgage becomes due before the decree, the defendant cannot defeat the action as to this mortgage by tendering the amount due on the first mortgage after the maturity of the second.[8] If the last mortgage be due, but only a part of the first is due, the plaintiff is entitled to a decree for the sale of enough of the mortgaged premises to pay both mortgages, unless the defendant pay the second mortgage and all that has become due of the first.[9]

When the debt is payable by instalments, action to foreclose may be brought when the first instalment falls due and is not paid.[10]

[1] Severance *v.* Griffith, 2 Lans. (N. Y.) 38, and cases cited; Caryl *v.* Williams, 7 Lans. (N. Y.) 416; Coleman *v.* Van Rensselaer, 44 How. (N. Y.) Pr. 368.

[2] King *v.* Harrington, 2 Aik. (Vt.) 33.

[3] Fryer *v.* Rockefeller, 63 N. Y. 268.

[4] McKinney *v.* Miller, 19 Mich. 142.

[5] Field *v.* Hawxhurst, 9 How. (N. Y.) Pr. 75; Tower *v.* White, 10 Paige (N. Y.), 395.

[6] Roosevelt *v.* Ellithorp, 10 Paige (N. Y.), 415; Oconto County *v.* Hall, 42 Wis. 59.

[7] Demarest *v.* Berry, 16 N. J. Eq. 481.

[8] Hawkins *v.* Hill, 15 Cal. 499.

[9] Hall *v.* Bamber, 10 Paige, 296.

[10] Grattan *v.* Wiggins, 23 Cal. 16.

If the mortgage secures the payment of several notes, it may be foreclosed upon the non-payment when due of any of them.[1]

1459. Foreclosure for instalment. — Foreclosure may be had for any part of the mortgage debt due at the time, and no more; and when the mortgagee elects to sell under a power in the mortgage, or to foreclose in chancery, he can only sell or foreclose for the amount then due, according to the terms of the mortgage; and if he sells the entire estate, that of necessity operates to release the security for the amount not due.[2] For stronger reasons a foreclosure for a part only of a mortgage debt, when it is all due, operates as a release of the portion not embraced in the foreclosure. The mortgage of record showing that the entire debt is due, and a portion only foreclosed, all persons have a right to conclude that the other part of the debt has been paid. The lien of the mortgage is released as to creditors, and as to parties holding the land under the prior foreclosure and sale.[3]

When a decree of foreclosure to satisfy a part of the mortgage debt expressly declared that the property should be sold subject to a lien to secure the payment of the notes not then due, and at the sale the premises were purchased by the mortgagee, it was held that this operated as a satisfaction of the entire debt, as well the portion not due as that which was. The purchaser virtually became a mortgagor to the extent of the balance of the mortgage debt. No action at law can afterwards be maintained on the notes.[4] But the mortgage may be foreclosed for an instalment of the interest due without waiting for the maturity of the note, and a sale may be had of so much of the mortgaged premises as will be necessary to pay this with costs of suit.[5] Interest falling due yearly, on a note secured by mortgage, is an instalment of the debt for which the mortgage may be foreclosed in equity. It is due and payable as much as if a separate note had been given for it. An action at law may also be maintained for the interest as it falls due.[6]

Although a mortgagee holding several notes maturing at different times may, under the statute, foreclose as to all when one of

[1] Miller *v.* Remley, 35 Ind. 539.

[2] Smith *v.* Smith, 32 Ill. 198.

[3] Rains *v.* Mann, 68 Ill. 264; and see Hughes *v.* Frisby, 81 Ill. 188.

[4] Mines *v.* Moore, 41 Ill. 273; Weiner *v.* Heintz, 17 Ill. 259; Hughes *v.* Frisby, 81 Ill. 188.

[5] Morgenstern *v.* Klees, 30 Ill. 422.

[6] Morgenstern *v.* Klees, *supra*.

them is due, yet he may institute his suit to foreclose that note alone, and a judgment upon this is no bar to a subsequent suit to enforce payment of another note afterwards maturing. The several notes are considered as so many successive mortgages.[1]

A mortgage given to secure several notes payable at different times is not, it would seem, so far divisible that the holder of all the notes may, after they have all matured, have separate actions upon each note. All the notes should in such case be included in one action; and if the holder obtains a decree and sale upon one note, it is probable that he would not be allowed to maintain a subsequent action upon either of the other notes.[2] At any rate it has been held that when such holder has foreclosed for the note last due only, a subsequent purchaser, without notice that the other notes remain unpaid, has a right to presume that they have already been paid,[3] although in his deed of purchase he assumed the amount of the mortgage as part of the purchase money.[4]

1460. When the bill is filed by the holder of one of several mortgage notes it should state whether the other notes have been paid, and if not paid by whom they are held, and the dates of their maturing, so that the rights of the holders of the other notes may be determined and protected.[5] But if the complainant holds all the notes he is not obliged to foreclose for all of them. He may take judgment in the foreclosure suit for part of them, and for those not included in the decree of foreclosure he may recover in a suit at law.[6]

1461. When one mortgagor is not liable for the debt, as, for instance, when only one of two or more persons who have joined in the execution of the mortgage has executed the note, or incurred any personal liability for the payment of the debt, or when a wife has mortgaged her land to secure her husband's note, the bill should properly pray for a decree of sale against the persons who executed the mortgage, and for a personal judgment only against the debtor.[7]

1462. The bill should so describe the mortgaged property that if a sale is ordered the officer may know on what land to ex-

[1] §§ 606, 1577, 1591, 1700; Crouse *v.* Holman, 19 Ind. 30.

[2] Minor *v.* Hill, 58 Ind. 176, per Worden, J.

[3] Rains *v.* Mann, 68 Ill. 264.

[4] Minor *v.* Hill, *supra.*

[5] Levert *v.* Redwood, 9 Port. (Ala.) 79; Hartwell *v.* Blocker, 6 Ala. 581.

[6] Lagdon *v.* Paul, 20 Vt. 217.

[7] Rollins *v.* Forbes, 10 Cal. 299.

ecute the order of court.[1] A bill which contains no sufficient description of the property, and refers to a mortgage annexed which in turn contains no sufficient description, but itself refers therefor to another instrument, is fatally defective.[2] It is generally sufficient, however, to describe the premises as they appear in the mortgage itself. The uncertainty of that description is no ground for refusing a decree of sale, though it may affect the title to the premises when sold.[3] If the description be correct in the bill, a decree entered by default cannot be avoided by showing that the mortgage as recorded misdescribed the premises.[4] If a bill to foreclose a mortgage upon several tracts of land describe some of them sufficiently, though others be insufficiently described, there is no ground for demurrer to the entire bill.[5]

A description in the mortgage may be sufficient to convey the property as against the mortgagor, and yet be insufficient, unaided by proper averments in the complaint, to authorize a decree of foreclosure and sale. Such averments cannot aid a description which is so indefinite as to render the mortgage void; but they will cure a description which is merely insufficient, and proper evidence being introduced to support such averment, the decree may specify the true boundaries.[6] In a bill to foreclose a mortgage upon certain real estate, with two mills, and all "appurtenances thereunto belonging," an allegation that a certain mill-dam and water-power are appurtenant to said mills and real estate, sustained by admissions by the defendant, will support a judgment that the mortgage is a lien upon said dam and water-power as well as upon the real estate more particularly described.[7]

1463. May omit part. — Although a mortgage cannot be the subject of several different foreclosure suits with reference to different tracts embraced in it, yet if part of the land has been sold under a prior mortgage, or the mortgagee's title to a part of it

[1] Triplett *v.* Sayre, 3 Dana (Ky.), 590; Struble *v.* Neighbert, 41 Ind. 344; Magee *v.* Sanderson, 10 Ind. 261; Whittlesey *v.* Beall, 5 Blackf. 143; Davis *v.* Cox, 6 Ind. 481; Cecil *v.* Dynes, 2 Ind. 266; Nolte *v.* Libbert, 34 Ind. 163; White *v.* Hyatt, 40 Ind. 385.

[2] Struble *v.* Neighbert, *supra;* Emeric *v.* Tams, 6 Cal. 155.

[3] Tryon *v.* Sutton, 13 Cal. 490; Whitney *v.* Buckman, Ib. 536. For a case of incompatible description see Schmidt *v.* Mackey, 31 Tex. 659.

[4] Deitrich *v.* Lang, 11 Kans. 636.

[5] Rapp *v.* Thie, 61 Ind. 372.

[6] Halstead *v.* Board of Comm'rs of Lake County, 56 Ind. 363; Slater *v.* Breese, 36 Mich. 77; Shepard *v.* Shepard, 36 Mich. 173.

[7] Lanoue *v.* McKinnon, 19 Kans. 408.

fails from any cause, or he has released a part from the operation of the mortgage, he may omit such part from his bill.[1] In like manner when a part has not been released, but the mortgagee enforces his mortgage upon one piece only, he thereby waives the lien upon the remainder. The mortgage cannot be foreclosed piecemeal. The mortgagor, however, if he still owns the equity of redemption, cannot complain of the omission, although there be a deficiency for which a personal judgment is rendered against him.[2]

1464. Reforming description. — Where by mistake a piece of land not intended to be mortgaged was included in the description, the mortgage may be foreclosed as to the other land without first reforming the deed.[3] But if the premises are misdescribed so that the instrument must be reformed before proceeding, the equity jurisdiction of the court is broad enough to accomplish this in the same suit, which may afterwards proceed to foreclosure.[4] In New Jersey, however, it is held that a mortgage cannot be reformed or corrected in a foreclosure suit; but that the only remedy is by a cross-bill for that purpose.[5] A mistake in the description first made in the mortgage, and afterwards carried all through the proceedings and into the sheriff's deed, may afterwards, by a proceeding in equity, be reformed in all the instruments so as to make them conform to the intention of the parties.[6] When reformed the lien attaches to the property intended to be covered by it from the date of the execution of the mortgage, and not merely from the date of the reformation.[7] If the description in the mortgage deed contains a latent ambiguity as to the boundaries, the court may in the foreclosure suit determine them.[8]

1465. Record. — In a bill against the mortgagor it is not necessary to aver that the mortgage is recorded, for he is liable without any record; or to aver that he has not conveyed away the

[1] Sedam *v.* Williams, 4 McLean, 51.

[2] Mascarel *v.* Raffour, 51 Cal. 242.

[3] Conklin *v.* Bowman, 11 Ind. 254; and see Andrews *v.* Gillespie, 47 N. Y. 487; Gillespie *v.* Moon, 2 Johns. (N. Y.) Ch. 585.

[4] §§ 97-99; Davis *v.* Cox, 6 Ind. 481; Halstead *v.* Board of Comm'rs of Lake County, 56 Ind. 363; Barnaby *v.* Parker, 53 Ind. 271; Alexander *v.* Rea, 50 Ala. 450; McCrary *v.* Austell, 46 Ga. 450; Adams *v.* Stutzman (C. P. Ohio, 1878), 7 Am. L. Record, 76.

[5] Graham *v.* Berryman, 19 N. J. Eq. 29; French *v.* Griffin, 18 N. J. Eq. 279.

[6] Quivey *v.* Baker, 37 Cal. 465; Zingsem *v.* Kidd, 29 N. J. Eq. 516.

[7] Adams *v.* Stutzman, *supra.*

[8] Doe *v.* Vallejo, 29 Cal. 385.

land, for he is a proper party in that case.[1] But if it be against a purchaser from the mortgagor, according to the practice in some states, the bill should allege either that the mortgage was duly recorded, or that the purchaser bought with notice of it;[2] but in others it is held that this is unnecessary; that it is purely a matter of defence, that the defendant purchased in good faith without notice, and he must set this up for himself.[3]

An averment that the mortgage was recorded within ninety days after its execution, without any further averment that it was properly, duly, or legally recorded, or statement where it was recorded, is insufficient; and the memorandum or certificate of the recorder on the copy of the mortgage filed with the complaint and therein referred to, being no part of the complaint, does not cure the defect.[4]

But a failure to allege the recording of the mortgage, or a notice to the purchaser of its existence, is cured by proof made of the one fact or the other without objection.[5]

1466. The debt secured by the mortgage must be set out and described. If the note or bond secured by the mortgage be set forth, it is not necessary to allege, or if alleged to prove, the consideration or debt for which this was given.[6] Although the note does not correspond with that described in the mortgage, as where this refers to a note payable in one year, whereas the note was payable in sixty days, under an agreement for renewals for a year, if the complaint fully explains this misdescription, and that the mortgage was really designed to secure this note, it states a good cause of action.[7] A complaint which set out an indebtedness of the mortgagors upon certain notes indorsed by them and discounted by the plaintiffs, and alleged that the mortgage was given to secure the payment of a bond for the amount of the indebtedness, the payment of which was thereby considerably extended, and that the mortgagors had failed to comply with

[1] Faulkner *v.* Overturf, 49 Ind. 265; Perdue *v.* Aldridge, 19 Ind. 290.

[2] Lyon *v.* Perry, 14 Ind. 515; Peru Bridge Co. *v.* Hendricks, 18 Ind. 11; Magee *v.* Sanderson, 10 Ind. 261; Culph *v.* Phillips, 17 Ind. 209; Faulkner *v.* Overturf, *supra*; Stevens *v.* Campbell, 21 Ind. 471.

[3] Stacy *v.* Barker, 1 Sm. & M. (Miss.) Ch. 112; Gallatian *v.* Cunningham, 8 Cow. (N. Y.) 361, 374.

[4] Faulkner *v.* Overturf, *supra*.

[5] Lyon *v.* Perry, 14 Ind. 515.

[6] Day *v.* Perkins, 2 Sandf. (N. Y.) Ch. 359; Brown *v.* Kahnweiler, 28 N. J. Eq. 311; Farnum *v.* Burnett, 21 N. J. Eq. 87.

[7] Merchants' Nat. Bk. *v.* Raymond, 27 Wis. 567.

the conditions of the bond, was held to allege a sufficient cause of action.[1]

1467. Reference to determine amount of debt. — It is the practice generally for the courts in case the bill is taken as confessed, or the right of the plaintiff is admitted by the answer, to order a reference as a matter of course to determine the amount due upon the mortgage debt.[2] According to the practice of some courts such a reference may be had whether the defendant has answered or not.[3] The reference generally embraces other matters also, as whether the premises can be sold in parcels, or whether there are equities requiring the sale to be made in a particular order; but the referee is always limited in his examination to the subjects specified in the order.[4] He should report the facts, and not merely his conclusions.[5] Upon the coming in of the report, exceptions may be taken to it, otherwise it is confirmed.[6] A final order of sale before the filing of the report is erroneous;[7] as it is also when made after the filing of it, and before it is confirmed or set down for hearing.[8] The decree is founded upon the report.[9]

1468. A renewal of the note should be alleged. The bill should contain all the allegations necessary to cover the facts intended to be introduced in evidence, otherwise the evidence will be inadmissible. Therefore, where a bill to foreclose a mortgage given to indemnify an indorser of a note alleged the indorsement of a note of a certain date and amount for the mortgagor, under the mortgage, but did not allege that the note was a renewal of a former one, it was held that although the mortgage secured the liability on the renewed note in the same manner as it secured the liability on the original one, yet without amending the bill, evi-

[1] Troy City Bank *v.* Bowman, 43 Barb. (N. Y.) 639; 19 Abb. (N. Y.) Pr. 18.

[2] Corning *v.* Baxter, 6 Paige (N. Y.), 178; Chamberlain *v.* Dempsey, 36 N. Y. 144; Anon. 3 How. (N. Y.) Pr. 158.

[3] Bassett *v.* McDonel, 13 Wis. 444; Beville *v.* McIntosh, 41 Miss. 516; Guy *v.* Franklin, 5 Cal. 416; Blackledge *v.* Nelson, 1 Dev. (N. C.) Eq. 418.

As to duties of referee generally, see Wolcott *v.* Weaver, 3 How. (N. Y.) Pr. 159; Gregory *v.* Campbell, 16 Ib. 417; Kelly *v.* Searing, 4 Abb. (N. Y.) Pr. 354.

[4] McCrackan *v.* Valentine, 9 N. Y. 42.

[5] Anon. 1 Clarke (N. Y.), 423; Security Fire Ins. Co. *v.* Martin, 15 Abb. (N. Y.) Pr. 479.

[6] Swarthout *v.* Curtis, 4 N. Y. 415; 5 How. Pr. 198.

[7] Graham *v.* King, 15 Ala. 563.

[8] Dean *v.* Coddington, 2 Johns. (N. Y.) Ch. 201.

[9] Pogue *v.* Clark, 25 Ill. 351; Sims *v.* Cross, 10 Yerg. (Tenn.) 460.

dence to prove the note described in the bill to have been given in renewal of a former one was inadmissible.[1]

1469. Proof of note. — It is no objection to the introducing of a note in evidence that it was not fully or perfectly described in the mortgage, the words "or order" in the note being omitted in the description.[2] Although the mortgage note be imperfectly described in the complaint, if it be filed with the complaint, and alleged to be the same note mentioned in the mortgage, and on the trial it be proved to be such, the defective description is cured.[3] The note or bond must be produced, or a good reason given for its non-production.[4] The fact that the note is in the possession of the defendant is a good reason why the plaintiff should not produce it in evidence. If in such case it contain, by way of indorsement or otherwise, anything to the advantage of the defendant, he may avail himself of it by offering the note in evidence.[5] If no personal judgment is sought, the recitals in the mortgage, without producing the note, are sufficient to authorize a foreclosure of the mortgage simply, according to some authorities,[6] though by others this is not sufficient unless the absence of the note is accounted for.[7] In a suit against a subsequent purchaser, after the death of the mortgagor and nearly twenty years after the maturity of the mortgage, a very satisfactory showing of a continuing obligation is required, in the absence of the securities themselves.[8]

Secondary evidence of the contents of the note and mortgage are inadmissible until proof is made of the loss or destruction of the originals.[9]

1470. It is not generally necessary to prove payment of the consideration money, unless this is put in issue by the pleadings, as the deed itself is sufficient evidence of it.[10]

[1] Boswell *v.* Goodwin, 31 Conn. 74, 81. See Schumpert *v.* Dillard, 55 Miss. 348.

[2] Hough *v.* Bailey, 32 Conn. 288; Boyd *v.* Parker, 43 Md. 182.

[3] Dorsch *v.* Rosenthall, 39 Ind. 209; Cleavenger *v.* Beath, 53 Ind. 172; and see Hadley *v.* Chapin, 11 Paige (N. Y.), 245.

[4] Beers *v.* Hawley, 3 Conn. 110; Lucas *v.* Harris, 20 Ill. 165; Moore *v.* Titman, 35 Ill. 310; Burgwin *v.* Richardson, 3 Hawks (N. C.), 203; Dowden *v.* Wilson, 71 Ill. 485; Hungerford *v.* Smith, 34 Mich. 300; Schumpert *v.* Dillard, *supra.*

[5] Hawes *v.* Rhoads, 34 Ind. 79.

[6] Arnold *v.* Stanfield, 8 Ind. 323; Hawes *v.* Rhoads, *supra.*

[7] See cases cited above, and Bennett *v.* Taylor, 5 Cal. 502. Because the mortgage is a mere incident to the debt.

[8] Hungerford *v.* Smith, *supra.*

[9] Dowden *v.* Wilson, 71 Ill. 485.

[10] §§ **610, 613**; Minot *v.* Eaton, 4 L. J. Ch. 134.

A mortgage made without consideration, and under a promise never performed, is void for all purposes as against the mortgagor, whether in the hands of the mortgagee or of a third person who has taken it as security without notice of the want of consideration.[1] The assignee could only take what the mortgagee could give him, and that was nothing at all. He can stand in no better situation than the mortgagee himself; and his only remedy is against the mortgagee.

1471. The bill must show that a right of action has accrued. The right of action to foreclose a mortgage, in general, accrues upon any breach of the condition. If there are several breaches, it is necessary to allege and prove only one; and if several are alleged, it is only necessary to prove one to be entitled to a decree.[2] If the mortgagee's right to the money secured by the mortgage is expressly made dependent upon his complying with a certain requirement, as, for instance, the perfecting of the title in some particular, the bill to foreclose the mortgage must distinctly allege the performance of such condition precedent.[3] If the mortgage debt is payable upon demand, the mortgagee may proceed at any time to foreclose and need not make or allege a previous demand;[4] and although the interest has been regularly paid,[5] if no time of payment be limited in a mortgage, it is payable within a reasonable time,[6] and generally would be regarded as due upon demand. If the mortgage secures a debt already due, and it specifies no time of payment, it may be foreclosed at any time.[7]

It is no valid defence to the foreclosure of a mortgage containing a clause making the principal sum due in case of default in paying the interest for a certain time after it is due, that the defendant was unable to find the holder of the mortgage until after the time for paying the interest had passed, unless the answer alleges fraud on the part of the plaintiff to prevent the payment of interest.[8] The court will not stay the suit when such default

[1] Parker *v.* Clarke, 30 Beav. 54. The mortgage in this case was given by a person in prison, under promises to release him which were never realized.

[2] Beckwith *v.* Windsor Manuf. Co. 14 Conn. 594, 602.

[3] Curtis *v.* Goodenow, 24 Mich. 18.

[4] See chapter xxv; Gillett *v.* Balcom, 6 Barb. (N. Y.) 370.

[5] Austin *v.* Burbank, 2 Day (Conn.), 474.

[6] Triebert *v.* Burgess, 11 Md. 452.

[7] Wright *v.* Shumway, 1 Biss. 23.

[8] Dwight *v.* Webster, 32 Barb. (N. Y.) 47; 10 Abb. Pr.; 19 How. (N. Y.) Pr. 349; and see Rosseel *v.* Jarvis, 15 Wis. 571.

of the whole debt occurs through the mere negligence of the mortgagor.[1]

1472. A bill to foreclose an indemnity mortgage must allege a payment on account of the liability for which the security was given,[2] and the precise amount paid;[3] though if the aggregate sum paid be stated it is not necessary that the several sums constituting this should be set out in detail.[4]

1473. An allegation in the bill that a person made a defendant has, or claims to have, a lien on the premises, which, if it exists, is subsequent to the plaintiff's mortgage, sufficiently shows that he is a proper party;[5] and such allegation is not bad on demurrer as stating no cause of action against him. What his interest in the property may be is only important in determining the rights to the surplus.[6] Though this general allegation of interest is held sufficient, it is also the practice to allege the nature of the interest of each subsequent incumbrancer, as that he claims to have an incumbrance by mortgage, the date and record of which are given, or by judgment entered at such a date.[7]

If any one of the defendants is an infant, this fact should appear, with a statement of his interest in the premises, so that a guardian may be appointed.

1474. The bill must show that defendant's interest is subject to the mortgage. Unless the bill discloses that the interest of a person named as a defendant is an interest junior or inferior to the mortgage lien of the plaintiff, it is insufficient to support a judgment against him. It should allege that his claim is subject to the lien of the mortgage.[8] But if a defendant be joined upon the allegation that he has or claims some interest adverse to the plaintiff, the nature and amount of which the latter is ignorant of, and desires that the defendant may be compelled to disclose, and such defendant answers by a general denial, he is in no condition to question a judgment foreclosing the defendant of

[1] Noyes *v.* Clark, 7 Paige (N. Y.), 179.

[2] Shepard *v.* Shepard, 6 Conn. 37; Collier *v.* Ervin, 2 Mon. T. 335. See §§ 379–387.

[3] Seeley *v.* Hills (Wis.), 7 Reporter, 312.

[4] Dye *v.* Mann, 10 Mich. 291. See, however, Shepard *v.* Shepard, *supra*.

[5] Bowen *v.* Wood, 35 Ind. 268; Aldrich *v.* Lapham, 6 How. (N. Y.) Pr. 129.

[6] Drury *v.* Clark, 16 How. (N. Y.) Pr. 424. See Frost *v.* Koon, 30 N. Y. 428, 448.

[7] 1 Crary N. Y. Prac. 289.

[8] See § 1440; Short *v.* Nooner, 16 Kans. 220; Nooner *v.* Short, 20 Kans. 644; Neitzel *v.* Hunter, 19 Kans. 221.

all right, title, and interest in the premises adverse to the plaintiff, because his answer denies that he has any claim or interest therein.[1]

1475. All the relief sought for in the action should be prayed for in the bill, inasmuch as the court will not generally grant any relief not demanded in the complaint, especially when no answer is interposed.[2] As will be noticed in a subsequent chapter, a judgment for the deficiency may be had in most of the states where foreclosure is obtained by an equitable action, at the same time that a decree for a sale of the property is entered; but if both of these remedies are desired, the complaint must ask for them; for otherwise, after default, no judgment for a deficiency can be rendered;[3] and the omission of a prayer for a sale of the property is ground for demurrer.[4]

1476. The essential grounds for relief or decree asked for must be set out in the bill; as, for instance, if the priority of the mortgage depends upon the fact that it was given for purchase money, or upon the fact that subsequent mortgagees had notice of the mortgage before they took their liens upon the property, no relief founded on these facts can be given unless they are stated in the bill; though being a formal defect the bill may be amended.[5]

1477. A personal judgment for a deficiency cannot be entered against a defendant unless it is asked for in the complaint.[6] But such a judgment may be entered upon a complaint which asks that the mortgage shall be foreclosed, that the mortgaged property shall be sold to pay the debt evidenced by the note, and to pay the costs, attorney's fees, &c., and that execution shall be issued for the balance. A petition no more defective than this may be amended at any time, without costs, so as to make it formal.[7]

1478. When the mortgage secures several notes, some of which are not due when the bill is filed, the complainant should

[1] Blandin *v.* Wade, 20 Kans. 251. And see Bradley *v.* Parkhurst, 20 Kans. 462.

[2] Bullwinker *v.* Ryker, 12 Abb. (N. Y.) Pr. 311; and see Grant *v.* Van Dercook 8 Abb. (N. Y.) Pr. N. S. 455; 57 Barb. 165.

[3] Simonson *v.* Blake, 20 How. (N. Y.) Pr. 484; 12 Abb. Pr. 331; Hansford *v.* Holdam (Ky. Sept. 1878), 7 Reporter, 177.

[4] Santacruz *v.* Santacruz, 44 Miss. 714.

[5] Armstrong *v.* Ross, 20 N. J. Eq. 109; Iowa County *v.* Mineral Point R. R. Co. 24 Wis. 93.

[6] Simonson *v.* Blake, 12 Abb. (N. Y.) Pr. 331; 20 How. Pr. 484; French *v.* New, 20 Barb. (N. Y.) 484; Bullwinker *v.* Ryker, 12 Abb. (N. Y.) Pr. 311.

[7] Foote *v.* Sprague, 13 Kans. 155.

ask in his bill that so much of the debt as may become due before final decree should be included in it.[1] It is irregular to include in the judgment a note which matured after the filing of the bill, unless some foundation is laid for it in the pleadings. If this is not done a supplemental bill should be filed, praying that the note which has matured since the filing of the bill should be included in the decree.[2] The action, however, cannot be commenced before anything is due, and then be made good by a supplemental complaint after a portion of it has matured;[3] but the action being properly begun, additional relief may in this way be had for rights that have since accrued.[4]

3. *The Answer and Defence.*

1479. In general. — Besides the special defences arising out of the circumstances of the particular case, there may of course be as many general defences as there are general allegations in the bill or complaint, as well as the defences applicable to contracts generally. There may be a denial of the execution and delivery of the mortgage, and of the plaintiff's right to maintain the action; a denial of personal liability; a denial of any title in the mortgagor at the time of giving the mortgage; an allegation of want of consideration, usury, or the statute of limitations; an allegation of a counter-claim or set-off; of non-joinder of defendants; of a discharge; of an equity of redemption in a part of the premises, and an equitable right to require the sale of the residue of them first; and finally, a disclaimer of title or interest. Some of these defences will be illustrated with such citations of cases as seem of general importance and application.

As a general rule one defendant cannot by his answer impeach the mortgage of a co-defendant; although he alleges in his answer that such mortgage was fraudulent and void, his co-defendant, to whom it belongs, is not bound to put in any defence. Such answer cannot be taken as confessed against him. One defendant can have relief against another only upon a cross-bill.[5]

1480. An answer founded upon a release or any written in-

[1] See §§ 606, 1459, 1577, 1591, 1700; Malcolm *v.* Allen, 49 N. Y. 488; Dan Hartog *v.* Tibbitts, 1 Utah T. 328.

[2] Williams *v.* Creswell, 51 Miss. 817.

[3] McCullough *v.* Colby, 4 Bosw. (N. Y.) 603.

[4] Candler *v.* Pettit, 1 Paige (N. Y.), 168; Bostwick *v.* Menck, 8 Abb. N. S. (N. Y.) Pr. 169.

[5] Brinkerhoff *v.* Franklin, 21 N. J. Eq. 334; Vanderveer *v.* Holcomb, Ib. 105.

strument may set it out at length with proper averments, or may give a brief description of it, with averments of the facts connected therewith. An answer which states merely a conclusion of law, without facts to support it, as, for instance, that the mortgage is of no binding effect, and no lien upon the premises described, is unavailing.[1]

1481. **The denial of an allegation must be explicit**, and not be left to be inferred. Where a complaint sets forth the condition of a bond, and avers that a mortgage securing it was executed "with the same condition as said bond," an answer which merely repeats the words of the condition as stated in the complaint, and avers that it is not contained in the mortgage, is not a denial that such was in substance the condition of the mortgage. The answer, to avail anything, should at least show that there was nothing on the face of the mortgage to connect it with the bond.[2]

1482. **The mortgagee's title cannot be questioned** in defence to the bill. This can only be investigated at law.[3] If he took, by virtue of his mortgage, any estate whatever which is still subsisting, he is entitled to a decree; and the court will not inquire what interest he has in the mortgaged estate, or whether he has any interest at all in some part of it.[4]

An exception is apparently made to this rule that the title is not in issue, in cases where usury may be shown in defence under statutes which would make the deed absolutely void, and usury in the loan is established. This, however, is not strictly an investigation of the title, but rather of the validity of the instrument; just as this is the inquiry when it is claimed that the maker of it was not of sound mind, or that he made it under duress, or that he did not make it at all.[5]

The owner of the equity of redemption subject to two mort-

[1] Caryl *v.* Williams, 7 Lans. (N. Y.) 416.

[2] Dimon *v.* Dunn, 15 N. Y. 498; reversing, Dimon *v.* Bridges, 8 How. Pr. 16.

"It simply pleads the existence of certain language, without denying the substance of the contract as set out in the complaint, and without setting out the contract itself, so that the court may see what it is. It may be well that nothing is said, in terms, in the mortgage, as to the effect of the non-payment of interest; and yet it may refer to the bond in such a manner as to adopt its provisions." Per Chief Justice Denio.

[3] Bull *v.* Meloney, 27 Conn. 560; Palmer *v.* Mead, 7 Conn. 149; Broome *v.* Beers, 6 Conn. 198; Anderson *v.* Baxter, 4 Oregon, 105.

[4] Hill *v.* Meeker, 23 Conn. 592; Wooden *v.* Haviland, 18 Conn. 101; Williams *v.* Robinson, 16 Conn. 517.

[5] Cowles *v.* Woodruff, 8 Conn. 35.

gages cannot object that the senior mortgagee yields his priority of lien to the junior mortgagee.[1]

It is no defence that the mortgage was executed by the heirs of the owner after his death, and that he left debts which remain unpaid, and that the estate is under administration in the probate court.[2]

1483. A mortgagor is estopped to deny his title. He cannot set up as a defence for himself against the mortgagee, that the property so mortgaged is trust property which he had no right to mortgage. He cannot claim adversely to his deed, but is estopped by it.[3] Whether this estoppel arises from the making of the mortgage deed, or from the relation of the mortgagor at common law as a *quasi tenant* of the mortgagee, or from express or implied covenants for title, has been an unsettled question. But at the present time, and especially where a mortgage is merely a lien and not a title, this estoppel must be regarded as arising only from a covenant for title, express or implied. In the absence of such a covenant the mortgagor may therefore show what his interest in the mortgaged lands was at the time of the delivery of the mortgage, and may show that a subsequently acquired title does not enure to the benefit of the mortgagee.[4] A wife joining her husband in a deed of his land, but not making any covenants, is not estopped to claim title to the land under a mortgage held by her.[5] The decree binds his interest, whatever that may be, and nothing more.[6] A mortgage made by the heirs of a deceased owner, before the settlement of the estate, cannot be objected to by them on the ground that the creditors and legatees of the estate have not been paid.[7] A mortgagor may, however, in an action brought by an assignee, set up and prove a mistake in the drawing of the instrument and have it reformed.[8] But it has been held that a mortgagor who had given a mortgage upon land held by him under the preëmption act, after filing his declaratory statement and before entry, and therefore void, was not estopped

[1] Mobile & Cedar Point R. R. Co. *v.* Talman, 15 Ala. 472.

[2] Cook *v.* De la Guerra, 24 Cal. 237.

[3] §§ 682, 683; Boisclair *v.* Jones, 36 Ga. 499; Usina *v.* Wilder, 58 Ga. 178; Strong *v.* Waddell, 56 Ala. 471.

[4] National Fire Ins. Co. *v.* McKay, 1 Sheldon (N. Y.), 138.

[5] Van Amburgh *v.* Kramer, 16 Hun (N Y.), 205.

[6] Bird *v.* Davis, 14 N. J. Eq. 467. See Hoff *v.* Burd, 17 Ib. 201.

[7] Cook *v.* De la Guerra, *supra*.

[8] Andrews *v.* Gillespie, 47 N. Y. 487.

from setting up the invalidity of it in defence when no fraud, misrepresentation, or concealment on his part was shown.[1]

1484. The mortgagor may be estopped by his declarations or agreements from setting up a defence otherwise valid; as where a purchaser of land subject to a mortgage admitted to a third person that it was all right and valid, and thereby induced him to buy it, he was not allowed afterwards to urge a failure of consideration of the mortgage to the injury of the assignee.[2] And so he may be estopped from taking advantage of a sale made without proper authority in the officer to sell, because no judgment of foreclosure had been entered on the mortgage; his admission that the debt was due; his acts at the sale in forwarding it and waiving matters of form; his delivery of possession to the purchaser, and his standing by and suffering purchasers to improve the property, are sufficient for this purpose.[3] And so where a mortgage made by one member of a banking firm to his copartner was sold by them to a purchaser, with the representation that it was a good bond and mortgage, each of them was held to be estopped from setting up the defence of usury.[4] A mortgagor who has induced another to take an assignment of his mortgage is estopped from denying the validity of it in the assignee's hands.[5]

1485. Defences against assignee. — It is not often that the mortgage is an obligation to the mortgagee personally which neither his assignee nor personal representative can enforce; yet such a mortgage may be made; and such was held to be the effect of a mortgage which was the only evidence of the indebtedness secured, and this was "to be paid by the mortgagor to the mortgagee, when called on by said mortgagee; and the mortgagor does not agree to pay the above sum to any one else except the mortgagee." The mortgagee having died without demanding payment, his administrator could not make demand, and maintain a suit upon the mortgage.[6] It may be presumed in such a case that the mortgagee intended that the debt should not be paid at all unless he himself should see proper to demand it; and that if he made no demand the indebtedness should be retained by the mortgagor

[1] Brewster *v.* Madden, 15 Kans. 249.

[2] Smith *v.* Newton, 38 Ill. 230.

[3] Cromwell *v.* Bank of Pittsburg, 2 Wall. Jun. 569.

[4] Hoeffler *v.* Westcott, 15 Hun (N. Y.) 243.

[5] Johnson *v.* Parmely, 14 Hun (N. Y.), 398; Norris *v.* Wood, Ib. 196.

[6] Sebrell *v.* Couch, 55 Ind. 122.

as a gift; and having died without making such demand the gift became complete.

In those states in which a transfer of the mortgage note carries with it the mortgage security, it is no defence to a suit by an assignee that he had no formal assignment of the mortgage.[1] The fact that he purchased the mortgage at a discount is no defence.[2] If the assignment was obtained by fraud, the defendant may show that he has paid it to the mortgagee from whom the plaintiff so obtained it.[3]

Where an assignee seeks to foreclose a mortgage which the mortgagee testifies was given without consideration moving from him, and that he assigned it at the request of one of the mortgagors without consideration, this evidence casts upon the complainant the burden of proof that there was a consideration for the mortgage.[4]

1486. Assignee need not have paid value. — It is not necessary to constitute a *bonâ fide* holding by the assignee that he should have paid value for the security at the time of receiving it. A part consideration is sufficient.[5] A farmer and his wife, on the line of a proposed railroad in Wisconsin, subscribed to stock in the road, and mortgaged their farm to secure a negotiable note given in payment of the subscription, upon representations made by agents of the road and others that the road would prove a very lucrative investment, and a very profitable thing to the neighborhood. After a good deal of money had been laid out in grading and other work upon the road, the further building of it was stopped for want of funds, and it remained unfinished. The mortgage having been assigned before maturity to a director of the road, who was also a large creditor of it at the time the mortgage was made, upon a bill filed by him to foreclose it, he was held to be a *bonâ fide* holder for value, and entitled to a decree.[6]

[1] Rice *v.* Cribb, 12 Wis. 179; Jackson *v.* Blodget, 5 Cow. (N. Y.) 205; Jackson *v.* Willard, 4 Johns. (N. Y.) 43.

[2] Knox *v.* Galligan, 21 Wis. 470; Croft *v.* Bunster, 9 Wis. 503; Grissler *v.* Powers, 53 How. Pr. (N. Y.) 194, and cases cited.

[3] Hall *v.* Erwin, 60 Barb. 349; 57 N. Y. 643; 66 N. Y. 649.

[4] Bishop *v.* Felch, 7 Mich. 371.

[5] Croft *v.* Bunster, *supra.*

[6] Sawyer *v.* Prickett, 19 Wall. 146. In this case, moreover, the representations were not considered binding, because they were promissory, and not representations of existing facts peculiarly within the knowledge of the party making them. And see Leavitt *v.* Pell, 27 Barb. (N. Y.) 322.

1487. When assignee takes free from equities. — The assignee before maturity of a negotiable note secured by mortgage takes it free from any equitable defences which the mortgagor might have had against it in the hands of the mortgagee, of which the assignee had no notice at the time the assignment was made.[1] When a defence valid against the assignor is made, the plaintiff must show that he is a *bonâ fide* purchaser for value, where that issue is raised by the pleadings.[2] The rule in this respect is the same whether the negotiable note is secured by a mortgage or not. "The contract as regards the note," says Mr. Justice Swayne,[3] "was, that the maker should pay it at maturity to any *bonâ fide* indorsee, without reference to any defences to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfilment of that contract. To let in such a defence against such a holder would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently in good faith became a party. If the mortgagor desired to reserve such an advantage, he should have given a non-negotiable instrument. If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who 'puts trust and confidence in the deceiver should be a loser rather than a stranger.'"[4] Moreover, the mortgage being considered a mere incident of the debt, an accessory to the principal thing, the rights of the assignee in respect to the mortgage are determined by his rights respecting the debt.[5] If, therefore, the mortgage be given to secure the payment of a non-negotiable note or bond, the assignee takes it, as he would such note or bond, subject to the equitable defences which the defendant would have against it in the hands of the assignor.[6]

1488. It is a good objection to a suit that the complainant has parted with his interest in the mortgage before the time of

[1] See § 834; Carpenter *v.* Longan, 16 Wall. 271; Taylor *v.* Page, 6 Allen (Mass.), 86; Pierce *v.* Faunce, 47 Me. 507; Reeves *v.* Scully, Walk. (Mich.) Ch. 248; Cicotte *v.* Gagnier, 2 Mich. 381; Bloomer *v.* Henderson, 8 Mich. 395; Fisher *v.* Otis, 3 Chand. (Wis.) 83; Martineau *v.* McCollum, 4 Ib. 153; Croft *v.* Bunster, 9 Wis. 503; Cornell *v.* Hichens, 11 Wis. 353. *Contra*, see Baily *v.* Smith, 14 Ohio St. 396; Palmer *v.* Yates, 3 Sandf. (N. Y.) 137.

[2] Getzlaff *v.* Seliger, 43 Wis. 297.

[3] See Carpenter *v.* Longan, *supra*.

[4] "Accessorium non ducit, sequitur suum principale."

[5] Carpenter *v.* Longan, *supra*; Martineau *v.* McCollum, 4 Chand. (Wis.) 153; Potts *v.* Blackwell, 4 Jones Eq. (N. C.) 58; Bennett *v.* Taylor, 5 Cal. 502.

[6] Matthews *v.* Wallwyn, 4 Ves. 126.

answering; the party in interest is not before the court.[1] On the other hand, a defendant who has no interest in the property cannot assail the mortgage.[2] If the mortgagor, after having suffered a bill of foreclosure to be taken as confessed against him, conveys his interest in the property, the purchaser takes it subject to the rights which the complainant has acquired in the suit, and to the admissions made by the mortgagor's default; and no defence can then be taken which would not have been open to the mortgagor had he not sold his interest.[3]

1489. Indemnity. — Although the condition of a mortgage may be for the payment of a certain sum of money, it is competent to show, by parol evidence, that the mortgage was really given to indemnify the mortgagee as a surety, and that his liability has been discharged without his being damnified. The effect of such proof is not to contradict or vary the mortgage, but to indemnify the demand to which it really refers.[4] If there has been no breach of the condition of a mortgage of indemnity, there can be no foreclosure of it.[5]

Where a suit is brought to foreclose a lost mortgage and note, the defendant cannot resist the payment of either principal or costs on the ground of a refusal to give him indemnity.[6] In case the defendant is entitled to any indemnity, he cannot take advantage of the right in this suit, unless that he can show he was ready before suit to tender payment on receiving indemnity.[7]

1490. Want of consideration for the mortgage or failure of it is a good defence to it.[8] A partial failure of consideration is a defence *pro tanto*. These defences must be distinctly pleaded.[9] A mortgage given in consideration that the mortgagee should serve nine months in the army as a substitute for the mortgagor, who had been drafted, cannot be enforced when it appears that the mortgagee deserted within a few weeks after being mustered into the service.[10]

[1] Wallace *v.* Dunning, Walk. (Mich.) 416; and see Smith *v.* Bartholomew, 42 Vt. 356.

[2] Carleton *v.* Byington, 18 Iowa, 482.

[3] Watt *v.* Watt, 2 Barb. (N. Y.) Ch. 371.

[4] Colman *v.* Post, 10 Mich. 422; Kimball *v.* Myers, 21 Mich. 276.

[5] Ide *v.* Spencer, 50 Vt. 293.

[6] Sharp *v.* Cutler, 25 N. J. Eq. 425.

[7] Massaker *v.* Mackerley, 1 Stockt. (N. J.) 440.

[8] § **610**; Conwell *v.* Clifford, 45 Ind. 392; Mell *v.* Moony, 30 Ga. 413; Akerly *v.* Vilas, 21 Wis. 88; Pacific Iron Works *v.* Newhall, 34 Conn. 77; Banks *v.* Walker, 2 Sandf. (N. Y.) Ch. 344; 3 Barb. Ch. 438.

[9] Philbrooks *v.* McEwen, 29 Ind. 347.

[10] Nelson *v.* McPike, 24 Ind. 60.

If it appears that the mortgage was given to secure future advances which were never made, the bill will be dismissed.[1] On the foreclosure of a mortgage given to secure the payment of judgments confessed by the mortgagor, but which were void for want of compliance with the statute, the defence may be taken that no indebtedness is shown, and the bill should be dismissed.[2] But when there was an actual consideration for a mortgage, generally the inquiry cannot be made whether the consideration was full and adequate.[3]

1491. One who buys land which is by the terms of his deed subject to a prior mortgage, whether he expressly assumes it as part of the purchase money or not, cannot set up as a defence to the foreclosure of it any failure or want of consideration in the mortgage as between the parties to it.[4] In a case in New York the owner of land made a mortgage to an insurance company for four thousand dollars, upon which the company advanced only two thousand dollars at the time. A further loan from the company of two thousand dollars was then contemplated, but was never made. The owner conveyed his equity of redemption subject to the mortgage, for a consideration expressed in the deed, from which the four thousand dollars were deducted. Several subsequent conveyances of the premises were made in the same manner. Afterwards the owner procured the insurance company to assign the mortgage to a creditor, who paid the company the amount advanced upon the mortgage, and credited the owner the balance of the four thousand dollars secured. The creditor was allowed to foreclose the mortgage for the entire sum of four thousand dollars, against the objection of the purchaser of the equity of redemption, that it was a valid lien for only the amount

[1] McDowell *v.* Fisher, 25 N. J. Eq. 93.

[2] Austin *v.* Grant, 1 Mich. 490.

[3] Norton *v.* Pattee, 68 N. Y. 144.

[4] § 744; Horton *v.* Davis, 26 N. Y. 395; Price *v.* Pollock, 47 Ind. 362. The partial failure of consideration in this case was from a deficiency in the quantity of land. In some of the earlier cases in New York, grantees who had assumed the payment of existing liabilities were allowed to set up defences other than usury; all the authorities agreeing that such grantees cannot defend on that ground. See Russell *v.* Kinney, 1 Sandf. Ch. 34; Jewell *v.* Harrington, 19 Wend. 471; Hartley *v.* Tatham, 26 How. Pr. 158; Lester *v.* Barron, 40 Barb. 297. But the rule is established that the grantor may create any lien he pleases upon the land, whether it be founded on any consideration as between him and the person in whose favor it is made or not, and if his grantee either expressly or impliedly undertakes for a consideration to pay it, he cannot defend against it. See cases cited under this section, and also Ritter *v.* Phillips, 53 N. Y. 586.

originally advanced upon it with interest.[1] The court said that the purchaser's position was in no respect different from what it would have been had the original owner counted out in cash the sum specified in the mortgage, and placed it in the hands of their grantee as their messenger, with directions to place it in the hands of the company, and he had placed it in the hands of his grantee, who had in turn delivered it to his grantee, the owner of the equity of redemption, with the same directions, who with the money in his pocket nevertheless proposed to prove that the mortgage was not a valid security for the amount in excess of the original advance. Mr. Justice Hunt said: "Two objections are mainly relied upon as justifying the judgment below: 1st. That the insurance company advanced only the sum of $2,000; that they could have enforced the mortgage for no greater amount against Allen and Stevens (the mortgagors); and that they could transfer to their assignee no greater rights than they possessed. 2d. That if Allen and Stevens, or the insurance company as their trustee, could have recovered the whole amount, that it was a lien or equitable claim, and that the simple transfer of the mortgage did not carry with it such lien or claim. 1st. I look upon the insurance company as holding this mortgage in a double capacity; as owners to one half of the amount, and as trustees for Allen and Stevens for the residue. The latter wished to impose a mortgage of $4,000 upon the lot. The insurance company did not wish to advance the whole amount, and the mortgagees were willing to accept a reduced amount, allowing the mortgage to stand for its face. It is quite true that, in a controversy between the mortgagees and the company, the latter could not have compelled the payment of the full amount. It is equally true that, where there is no such controversy, where the makers desire it to be enforced to its nominal amount, where the holders of the property have consented and agreed that it should be so enforced, and have had a deduction of $2,000 from their purchase money based upon the payment by them, or the subjecting the premises to the full amount of the mortgage, that the payment in full should be enforced. The insurance company may collect the full sum. They hold it for their own benefit to the amount advanced by them; as trustees for Allen and Stevens for the amount not allowed."

[1] Freeman *v.* Auld, 44 N. Y. 50; overruling same case in 37 Barb. 587. See Grissler *v.* Powers, 53 How. (N. Y.) Pr. 194, distinguished from above.

1492. Fraud is a good defence when it is shown that it was practised by the mortgagee or his agents upon the mortgagor; or when the mortgagee or his assignee, at the time of taking the mortgage, was aware that a fraud had been committed upon the mortgagor.[1] The answer should distinctly state the several facts necessary to constitute the fraud, and to bring the knowledge of it home to the mortgagee. The fraud may be a defence to the whole claim, or it may be a defence in part, and available as a counter-claim.

If the defendant in a foreclosure suit set up the defence that the mortgage was procured by false representations, the burden of proving them of course lies with him.[2]

1493. Usury is a defence.[3] — The effect of the illegal rate of interest may be obviated if it can be shown that it was inserted by mistake when the parties intended to provide for the legal rate only.[4] The law governing the contract as to usury is that of the state where it was made, if made in a state other than that in which the mortgaged property is situate.[5] It may be availed of by a wife for the protection of her homestead or of her dower interest, although her husband be estopped by his acts from setting it up as a defence.[6]

If the answer alleges generally that the mortgage contract is usurious without any specific allegation, the defence must be limited to a violation of the statute of the state regarding usury, and its usurious character under any other statute cannot be shown,[7] and such an answer under the systems of pleading and practice generally in vogue would amount to nothing.[8] The answer must allege the usury, and strict proof of the usurious character of the mortgage must be given.[9] After default has been entered, it

[1] §§ 624–632; Aikin *v.* Morris, 2 Barb. (N. Y.) Ch. 140; Reed *v.* Latson, 15 Barb. (N. Y.) 9; Allen *v.* Shackelton, 15 Ohio St. 145. And see Abbott *v.* Allen, 2 Johns. (N. Y.) Ch. 519; Champlin *v.* Laytin, 6 Paige (N. Y.), 189; affirmed, 18 Wend. 407.

[2] Sloan *v.* Holcomb, 29 Mich. 153; Perrett *v.* Yarsdorfer, 37 Mich. 596.

[3] §§ 633–663; De Butts *v.* Bacon, 6 Cranch, 252; Fanning *v.* Dunham, 5 Johns. (N. Y.) Ch. 122; Cowles *v.* Woodruff, 8 Conn. 35; Platt *v.* Robinson, 10 Wis. 128; Fay *v.* Lovejoy, 20 Wis. 407; Cox *v.* Douglas, 12 Iowa, 185; Outten *v.* Grinstead, 4 J. J. Marsh. (Ky.) 608.

[4] See §§ 633–649; Griffin *v.* N. J. Oil Co. 3 Stockt. (N. J.) 49.

[5] § 657; Dolman *v.* Cook, 14 N. J. 56.

[6] Campbell *v.* Babcock, 27 Wis. 512.

[7] Atwater *v.* Walker, 16 N. J. Eq. 42.

[8] Mosier *v.* Norton, 83 Ill. 519.

[9] Richards *v.* Worthley, 5 Wis. 73; Munter *v.* Linn (Ala.), 2 South. L. J. 205. See Baldwin *v.* Norton, 2 Conn. 161; Wheaton *v.* Voorhis, 53 How. (N. Y.) Pr. 319; Maher *v.* Lanfrom, 86 Ill. 513.

would seem that it will not be removed to allow this defence except upon special terms.[1]

Whether the defence of usury is a personal privilege of the debtor, or may be taken advantage of by others, is a question upon which the courts are divided in opinion. On the one hand, it is affirmed that any person who has become interested in the property subject to the mortgage, unless he has bought expressly subject to the mortgage, or has assumed the payment of it, may use this defence.[2] Thus a second or other subsequent mortgagee may take this defence.[3]

A judgment creditor of the mortgagor may avail himself of the defence of usury to the extent of his legal lien.[4] Creditors for whose benefit land has been conveyed in trust may set up this defence, though the trustees have neglected to do so.[5] Although a judgment for the full amount of the note and an order for sale have already been entered, subsequent incumbrancers may before final distribution, by answer or cross-petition, set up the defence of usury, and have the proceeds, to the amount of the usurious interest, applied to the payment of their liens.[6]

On the other hand, the weight of authority at the present time favors the rule, that when the debtor is himself willing to abide by the terms of his contract no one else can interfere and set up the defence of usury.[7] The fact that a usury law does not make

[1] Bard *v.* Fort, 3 Barb. Ch. 632.

[2] As in **New York**: Post *v.* Dart, 8 Paige, 640; Brooks *v.* Avery, 4 N. Y. 225. **Ohio**: Union Bank *v.* Bell, 14 Ohio St. 200. **Mississippi**: M'Alister *v.* Jerman, 32 Miss. 142. **Maryland**: Banks *v.* McClellan, 24 Md. 62. **New Hampshire**: Gunnison *v.* Gregg, 20 N. H. 100. **New Jersey**: Cummins *v.* Wire, 6 N. J. Eq. 73.

[3] Green *v.* Tyler, 39 Pa. St. 361.

[4] Post *v.* Dart, 8 Paige (N. Y.), 639.

[5] Union Bank at Massillon *v.* Bell, 14 Ohio St. 200.

[6] Brooke *v.* Morris, 2 Cin. (Ohio) 528.

[7] **Alabama**: Fielder *v.* Varner, 45 Ala. 429; Cain *v.* Gimon, 36 Ala. 168. **Connecticut**: Loomis *v.* Eaton, 32 Conn. 550. **Illinois**: Adams *v.* Robertson, 37 Ill. 45. **Indiana**: Studabaker *v.* Marquarett, 55 Ind. 341. **Iowa**: Carmichael *v.* Bodfish, 32 Iowa, 418; Huston *v.* Stringham, 21 Iowa, 36; Powell *v.* Hunt, 11 Iowa, 430. **Kansas**: Pritchett *v.* Mitchell, 17 Kans. 355, where the cases are reviewed and collected. **Kentucky**: Campbell *v.* Johnston, 4 Dana, 179. **Michigan**: Farmers' & Mechanics' Bank *v.* Kimmel, 1 Mich. 84. **Missouri**: Ransom *v.* Hays, 39 Mo. 445. **Pennsylvania**: Miners' Trust Bank *v.* Roseberry, 81 Pa. St. 309. Under an earlier statute in this state which made void a usurious contract, it was held that a second mortgagee or other person interested in the equity could set up this defence. Greene *v.* Tyler, 39 Pa. St. 361; Bachdell's Appeal, 56 Pa. St. 386. **Vermont**: Austin *v.* Chittenden, 33 Vt. 553.

void usurious contracts has been held to be decisive in favor of this view.[1]

1494. Usury cannot be set up as a defence by one who has purchased land subject to a mortgage, the amount of which is made part of the consideration of the purchase, whether he has assumed the payment of it or not.[2] When the purchaser sets up this defence the complainant cannot overcome it by proof that the lands were conveyed to him subject to the mortgage, unless his pleading set forth the execution and terms of the conveyance.[3] But a purchaser who has bought not merely the equity of redemption, but the whole title, paying the full price, with no deduction on account of the mortgage, may set up usury.[4]

A mortgagor who has conveyed the property subject to a mortgage which is usurious, and has afterwards taken a reconveyance in which nothing is said about the mortgage, is entitled to set up the defence of usury.[5] It was suggested that if there had been a personal liability on the part of the intermediate purchaser to pay the mortgage debt, it might not be in his power to release that liability by such a reconveyance without the consent of the mortgagee.

1495. Accordingly a mortgagor may be estopped from setting up the defence of usury. If a mortgage should be made for the purpose of being sold at a discount to some third person, and subsequently assigned at a considerable discount under a promise of the mortgagor that he would make an affidavit to the effect that the consideration of the mortgage was the full amount ex-

[1] Miners' Trust Bank *v.* Roseberry, 81 Pa. St. 309.

[2] §§ 633, 644, 745: Reed *v.* Eastman, 50 Vt. 67; Hartley *v.* Harrison, 24 N. Y. 170; Morris *v.* Floyd, 5 Barb. (N. Y.) 130; Sands *v.* Church, 6 N. Y. 347; Mason *v.* Lord, 40 N. Y. 476; Post *v.* Dart, 8 Paige (N. Y.), 639; Hardin *v.* Hyde, 40 Barb. (N. Y.) 435; Freeman *v.* Auld, 44 N. Y. 50; Merchants' Ex. Nat. Bank *v.* Commercial Warehouse Co. 49 N. Y. 635, 643, note; De Wolf *v.* Johnson, 10 Wheat. 367; Thomas *v.* Mitchell, 27 Wis. 414; Stein *v.* Indianapolis, &c. Ass'n, 18 Ind. 237; Butler *v.* Myer, 17 Ind. 77; Wright *v.* Bundy, 11 Ind. 398; Price *v.* Pollock, 47 Ind. 362, 366, per Downey, J.; Perry *v.* Kearns, 13 Iowa, 174; Greither *v.* Alexander, 15 Iowa, 470; Huston *v.* Stringham, 21 Ib. 36; Sellers *v.* Botsford, 11 Mich. 59; Cramer *v.* Lepper, 26 Ohio St. 59; S. C. 20 Am. R. 756; Hough *v.* Horsey, 36 Md. 181; S. C. 11 Am. R. 484; Conover *v.* Hobart, 24 N. J. Eq. 120. When grantee's title is in hostility to the mortgage, see Chamberlain *v.* Dempsey, 9 Bos. (N. Y.) 212.

[3] Hetfield *v.* Newton, 3 Sandf. (N. Y.) Ch. 564.

[4] Lilienthal *v.* Champion, 58 Ga. 158; Maher *v.* Lanfrom, 86 Ill. 513.

[5] Knickerbocker Life Ins. Co. *v.* Nelson, 13 Hun (N. Y.), 321.

pressed in it, and that there was no defence or set-off, he would be precluded from contradicting his affidavit, if he obtained the money upon the strength of it.[1] And so if a mortgagor upon the assignment of a mortgage by the mortgagee signs a certificate stating that the whole principal sum and interest thereon is due without any offset or legal or equitable defence, the mortgagor is estopped from setting up usury.[2] But where part of the money is paid before the giving of the affidavit, the creditor does not, in paying it, act upon the statements contained in the affidavit, and therefore the mortgagor is not estopped from asserting the usurious nature of the transaction so far as the amount then paid is concerned. That the creditor believes that an estoppel will be made in the future avails nothing.[3]

1496. Set-off. — Upon a bill to foreclose, the mortgagor is allowed to set off a debt due to him from the complainant, not only in cases where this would be allowed in actions at law,[4] but also in cases of peculiar equity not strictly within the rules of law; as, for instance, in an action against a mortgagor and his surety on a bond secured by the mortgage, a debt due the mortgagor from the plaintiff may be allowed in set-off. The joint bond in such case is nothing more than a security for the separate debt of the mortgagor. The mortgage is executed by him alone, and is a lien upon his land, and his interests alone are affected by the foreclosure. That a joint judgment might be rendered on the bond for any deficiency does not exclude the allowance of the counter claim.[5] The defendant cannot make a counter claim and demand judgment upon it, unless he is personally liable to the plaintiff, or claims an interest in the mortgaged premises. His counter claim must in some way go to qualify or defeat the plaintiff's demand.[6]

1497. If the suit to foreclose be brought in the name of a

[1] Real Estate Trust Co. *v.* Rader, 53 How. (N. Y.) Pr. 231.

[2] Smyth *v.* Lombardo, 15 Hun (N. Y.), 415.

[3] Payne *v.* Burnham, 62 N. Y. 69.

[4] Nat. F. Ins. Co. *v.* McKay, 21 N. Y. 191, 196; Irving *v.* De Kay, 10 Paige (N. Y.), 319; Chapman *v.* Robertson, 6 Paige (N. Y.), 627; Holden *v.* Gilbert, 7 Paige (N. Y.), 208; Hunt *v.* Chapman, 51 N. Y. 555; Hess *v.* Final, 32 Mich. 515; Lockwood *v.* Beckwith, 6 Mich. 168.

In earlier cases it was held that the defendant could not set off a demand, but must resort to a cross-bill. Troup *v.* Haight, Hopk. (N. Y.) Ch. 239.

[5] Ex parte Hanson, 12 Ves. 346; Bathgate *v.* Haskin, 59 N. Y. 533; Holbrook *v.* Receivers, &c. 6 Paige (N. Y.), 220.

[6] Lathrop *v.* Godfrey, 3 Hun (N. Y.), 739; 6 Thomp. & C. 96; Nat. Fire Ins. Co. *v.* McKay, *supra*.

person other than the real owner of the mortgage note, the defendant may have the benefit of any defence or set-off he has against the real owner. No other defence can be set up on the ground that the holder of the mortgage security is prosecuting the foreclosure for the benefit of another person.[1]

1498. To entitle the defendant to set off against the mortgage debt any payment made by him, it must be shown that it was made in direct payment of part of the debt, or that it was agreed that this sum should be received and credited on account of the mortgage;[2] because if there was no actual appropriation by the debtor at or before the time of payment, the creditor may apply the payment to any other claim he has at his discretion.[3] An independent claim of the mortgagor cannot be set off.[4] Moreover, to entitle the defendant to set off a debt, it must have been due to him from the plaintiff at the time the foreclosure suit was commenced.[5] Generally a claim for unliquidated damages cannot be set off when the defendant has an adequate remedy at law; but under the codes of practice in some states such a claim may be allowed.[6]

A mortgage to secure future advances is valid only to the amount of the advances actually made; but the mortgagee's failure to complete the contemplated advances affords ground for only nominal damages by way of set-off;[7] unless, perhaps, there was an express obligation to make them. Under a covenant by the mortgagee to make partial releases, damages sustained by his refusal to release may be a matter of equitable offset to his claim upon the mortgage.[8]

1499. Illegal interest previously paid upon the mortgage or included in it may be offset,[9] as also may be a payment of a bonus in addition to the lawful interest paid to procure an extension of time within which to pay the debt.[10]

[1] Spear *v.* Hadden, 31 Mich. 265; Lathrop *v.* Godfrey, 3 Hun (N. Y.), 739; Chase *v.* Brown, 32 Mich. 225.

[2] Dudley *v.* Bergen, 23 N. J. Eq. 397; Dolman *v.* Cook, 14 N. J. Eq. 56; Conaway *v.* Carpenter, 58 Ind. 477.

[3] Bird *v.* Davis, 14 N. J. Eq. 467.

[4] White *v.* Williams, 3 N. J. Eq. (2 Green) 376.

[5] Holden *v.* Gilbert, 7 Paige (N. Y.), 208; Knapp *v.* Burnham, 11 Ib. 330; Thompson *v.* Ellsworth, 1 Barb. (N. Y.) Ch. 624.

[6] Hattier *v.* Etinaud, 2 Desau. (S. C.) 570.

[7] Dart *v.* McAdam, 27 Barb. (N. Y.) 187.

[8] Warner *v.* Gouverneur, 1 Barb. (N. Y.) 36.

[9] § 648; Pond *v.* Causdell, 23 N. J. Eq. 181; Harbison *v.* Houghton, 41 Ill. 522; Ward *v.* Sharp, 15 Vt. 115.

[10] Real Est. Trust Co. *v.* Keech, 7 Hun

1500. It is no defence to a foreclosure suit on a purchase money mortgage that there is an outstanding title or incumbrance. The mortgagor is left to his remedy on the covenant. If, however, the mortgagor has been evicted, or, according to some authorities, if an ejectment suit has been commenced against him on such outstanding title, the court will interfere.[1] In the latter case proceedings upon the mortgage, even if it be a power of sale mortgage not requiring a suit, will be enjoined until the action of ejectment is determined.[2] Although there is an objection to undertaking a settlement of unliquidated damages in a court of equity, yet this may be done either by directing an issue, or by a reference to a master to ascertain the damages, before entering a decree upon the mortgage; or the court may avoid this objection by staying the foreclosure suit until the damages arising from the failure of title are ascertained in a suit at law.[3]

The same rule applies to a bill to enforce a lien for purchase money. "The rule," says Mr. Justice Swayne of the Supreme Court,[4] "is founded in reason and justice. A different result would subvert the contract of the parties and substitute for it one which they did not make. In such cases the vendor by his covenants, if there be such, agrees upon them, and not otherwise, to be responsible for defects of title. If there are no covenants, he assumes no responsibility and the other party takes the risk. The vendee agrees to pay according to his contract, and secures payment by giving a lien upon the property. Here it is neither expressed nor implied that he may refuse to pay and remain in possession of the premises — nor that the vendor shall be liable otherwise than according to his contract."

1501. This defence is founded on the covenants. An answer to a suit to foreclose a mortgage given for the purchase money, which alleges a failure of title, must, in the absence of

(N. Y.), 253; McGregor *v.* Mueller, 1 Cin. (Ohio) 486.

[1] Price *v.* Lawton, 27 N. J. Eq. 325; Glenn *v.* Whipple, 1 Beasley (N. J.), 50; Van Waggoner *v.* McEwen, 1 Green's Ch. (N. J.) 412; Shannon *v.* Marselis, Saxton (N. J.), 413; Withers *v.* Morrell, 3 Edw. Ch. 560; Taylor *v.* Whitmore, 35 Mich. 97. Whether there can be any defence by way of recoupment, before eviction, was questioned in Church *v.* Fisher, 40 Ind. 145.

[2] Johnson *v.* Gere, 2 Johns. (N. Y.) Ch. 546; Edwards *v.* Bodine, 26 Wend. (N. Y.) 109. See, however, to the contrary, Peat *v.* Gilchrist, 3 Sandf. (N. Y.) Sup. Ct. 118, and cases cited.

[3] Coster *v.* Monroe Manuf. Co. 1 Green's Ch. (N. J.) 467; Couse *v.* Boyles, 3 Ib. 212.

[4] Peters *v.* Bowman (Oct. T. 1878), 11 Chicago L. N. 118; 7 Wash. L. R. 156.

any allegation of fraud, either set out the deed or the covenants contained in it;[1] because the defence is founded on the covenants of warranty or seisin. Therefore, where the deed contains no such covenants, as in the case of a deed made by executors, containing no covenants except against the acts of themselves and their testator, it is no defence that a portion of the property was covered by an incumbrance not specified in the covenant.[2] The existence of a lease upon part of the premises is no defence to a suit to foreclose the purchaser's mortgage, if it is no breach of any of the covenants of his deed, and his grantor did not fraudulently mislead him.[3]

1502. If the mortgagor is in undisturbed possession, and no suit is pending for the possession of the property by an adverse claimant, the courts will not generally interfere to restrain the vendor from foreclosing a mortgage given for the price of land conveyed with full covenants of warranty, on account of any alleged defects in the title not amounting to a total failure of consideration.[4] Before this defence will avail, there must be either an eviction or something tantamount to it.[5]

[1] Church *v.* Fisher, 40 Ind. 145; and see Davis *v.* Bean, 114 Mass. 358, 360.

[2] Niles *v.* Harmon, 80 Ill. 396; Sandford *v.* Travers, 40 N. Y. 140.

[3] Sandford *v.* Travers, 7 Bosw. (N. Y.) 498.

[4] Leggett *v.* McCarty, 3 Edw. Ch. (N. Y.) 124; Withers *v.* Morrell, Ib. 560; Edwards *v.* Bodine, 26 Wend. (N. Y.) 109; Tallmadge *v.* Wallis, 25 Ib. 107; Davison *v.* De Freest, 3 Sandf. (N. Y.) Ch. 456; Banks *v.* Walker, 3 Barb. (N. Y.) Ch. 438; York *v.* Allen, 30 N. Y. 104; Curtiss *v.* Bush, 39 Barb. (N. Y.) 661; Sandford *v.* Travers, 7 Bosw. (N. Y.) 498; Bumpus *v.* Platner, 1 Johns. (N. Y.) Ch. 218; Abbott *v.* Allen, 2 Ib. 519; Chesterman *v.* Gardner, 5 Ib. 29; Denston *v.* Morris, 2 Edw. (N. Y.) 37; Burke *v.* Nichols, 21 How. (N. Y.) Pr. 459; 34 Barb. 430; 2 Keyes, 670; Miller *v.* Avery, 2 Barb. (N. Y.) Ch. 582; Parkinson *v.* Jacobson, 13 Hun (N. Y.), 317; Hile *v.* Davison, 20 N. J. Eq. 228; Hulfish *v.* O'Brien, Ib. 230; Shannon *v.* Marselis, Saxt. (N. J.) 426; Van Waggoner *v.* M'Ewen, 1 Green (N. J.) Eq. 412; Glenn *v.* Whipple, 12 N. J. Eq. (1 Beas.) 50; Miller *v.* Gregory, 16 N. J. Eq. 274; Key *v.* Jennings, 66 Mo. 356, 368; Smith *v.* Fiting, 37 Mich. 148; Patten *v.* Taylor, 7 How. 132, 159. Mr. Justice Nelson, in the latter case, referring to several authorities there cited, said: "These cases will show that a purchaser, in the undisturbed possession of the land, will not be relieved against the payment of the purchase money on the mere ground of defect of title, there being no fraud or misrepresentation; and that, in such a case, he must seek his remedy at law on the covenants in his deed. That if there is no fraud, and no covenants to secure the title, he is without remedy; as the vendor, selling in good faith, is not responsible for the goodness of his title, beyond the extent of his covenants in the deed." This doctrine is affirmed in Noonan *v.* Lee, 2 Black, 499, 508; Peters *v.* Bowman (Supreme Ct. of U. S.), 11 Chicago L. N. 118; and is sustained also in Hill *v.* Butler, 6 Ohio St. 207, where numerous cases are cited. See § **1355** near end.

[5] Plat *v.* Gilchrist, 3 Sandf. (N. Y.)

It is not always necessary that the purchaser should show that he has been dispossessed to establish eviction; it may be established by proof that at the time of his purchase the lands were in the actual possession of one claiming under a title hostile to his vendor, by reason of which he had not and could not obtain possession.[1] Neither is it necessary that he should resist the claim under the paramount title, or even await eviction by legal process. He may voluntarily surrender possession; but then must stand ready to show that the title to which he surrendered was paramount, and was covered by his grantor's covenants of warranty.[2] If a judgment for the possession of the property be recovered against him, his delivery of possession, without awaiting expulsion by legal process, is an eviction.[3] The mortgagor may safely pay the adverse claimant with the consent of his mortgagee that the amount may be applied in reduction of the mortgage debt, if he obtain sufficient evidence of such consent.[4]

The defence of eviction cannot be set up by one who has merely purchased the equity of redemption subject to the mortgage, without assuming any personal liability for it, or against whom no personal claim is made, merely upon the ground that he is the assignee of the plaintiff's covenants.[5] Eviction is no defence when no right or title to the part of the land from which the mortgagor is evicted was conveyed to him; as where a building and fence, not specified in the deed, encroached on an adjoining lot.[6]

1503. Cases exceptional to general rule. — The rule generally is that above stated, that the entire want of title in the vendor, or the partial failure of it, is no defence to the action, unless fraud be shown or the mortgagor has been evicted.[7] Yet it

Sup. Ct. 118. In this case the earlier cases are reviewed at length.

[1] Withers *v.* Codwise, 2 Sandf. (N. Y.) Ch. 350.

[2] York *v.* Allen, 30 N. Y. 104; Cowdrey *v.* Coit, 44 N. Y. 382, 392, per Gray, Com'r; Simers *v.* Saltus, 3 Den. (N. Y.) 214.

[3] Dyett *v.* Pendleton, 8 Cow. (N. Y.) 727.

[4] Hart *v.* Carpenter, 36 Mich. 402. After the death of the mortgagee there may be difficulty in proving his oral admissions.

[5] Nat. Fire Ins. Co. *v.* McKay, 21 N. Y. 191; Van Houten *v.* McCarty, 4 N. J. Eq. (3 Green) 141; Brou *v.* Becnel, 20 La. Ann. 254; and see Sandford *v.* Travers, 40 N. Y. 140.

[6] Burke *v.* Nichols, 1 Abb. (N. Y.) App. Dec. 260; 2 Keyes, 670.

[7] Booth *v.* Ryan, 31 Wis. 45; Robards *v.* Cooper, 16 Ark. 288; Cromwell *v.* Clifford, 45 Ind. 392; Rogers *v.* Place, 29 Ind. 577; Jordan *v.* Blackmore, 20 Ind. 419; Buell *v.* Tate, 7 Blackf. 55; Hume *v.* Dessar, 29 Ind. 112; Hubbard *v.* Chappel, 14 Ind. 601; Hanna *v.* Shields, 34 Ind. 84; Plowman *v.* Shidler, 36 Ind. 484; Conklin *v.* Bowman, 7 Ind. 533; Church *v.* Fisher, 40 Ind. 145.

has been held in some cases that the mortgagor may defend by a recoupment or offset of damages for a breach of the covenants in the deed to him, to the extent of the damages sustained, whether the failure of title be complete or partial.[1] A breach of covenant in the vendor's deed is a defence, where it is shown that the vendor is unable to respond to the damages occasioned by the breach.[2] When a remedy upon the covenants would be ineffectual, as, for instance, when the mortgagee is insolvent, the defendant in a suit upon the note or mortgage may set up the damages on the covenants.[3]

1504. But when the covenant is broken at the time the suit is brought to recover the purchase money and the amount claimed under it is certain, the purchaser is entitled to detain the purchase money to the extent to which he would at that time be entitled to recover damages upon the covenant, in order to avoid circuity of action. It is therefore held that a breach of the covenant of seisin in the vendor's deed may be set up as a defence to an action for the foreclosure of a mortgage given for the purchase money, although a breach of the covenant of warranty may not.[4] A total failure of title is a total failure of consideration. The obligation of the mortgagor is not made for a covenant of the mortgagee, but for the land; and if the land fails to pass, the promise of the mortgagor is a mere *nudum pactum*. The damages in an action on the covenant would be the same as the consideration for the promise; and it is just that the mortgagor should be allowed to show a total failure of consideration instead of being compelled to seek his remedy on the covenants.[5]

A covenant against incumbrances is broken at the time of the

[1] Coy *v.* Downie, 14 Fla. 544; Lowry *v.* Hurd, 7 Minn. 356; Walker *v.* Wilson, 13 Wis. 522; Hall *v.* Gale, 14 Wis. 54; Mendenhall *v.* Steckel, 47 Md. 453.

[2] McLemore *v.* Mabson, 20 Ala. 137.

[3] Knapp *v.* Lee, 3 Pick. (Mass.) 452.

[4] Latham *v.* McCann, 2 Neb. 276. The court say: "The parties in this case, as in every other case, must be bound by the bargain they have chosen to enter into. The grantee might have demanded a covenant of seisin, — the assurance that the grantor had at the time of making his deed the very estate, both as to quantity and quality, that he professed to convey. In such case, a failure of title to the land might be interposed in an action on the mortgage. Rice *v.* Goddard, 14 Pick. 293; Tallmadge *v.* Wallis, 25 Wend. 107. So might he have reserved a portion of the purchase money, by agreement, to await the clearing up of any suspicion on the title; but he chose, for some reason, to accept a deed with covenants of warranty. He cannot now come forward and say he will pay his note and mortgage upon certain alleged defects being remedied."

[5] Rice *v.* Goddard, 14 Pick. (Mass.) 293.

conveyance if a third person then had an interest in the land granted which diminished the value of the absolute interest in the same, while at the same time the fee passed by the deed. If an incumbrance upon land conveyed to the grantee by deed containing such a covenant, be fixed and capable of deduction out of the grantee's purchase money mortgage, a suit upon such mortgage may be allowed to proceed to judgment, when the amount of the incumbrance may be offset against the amount of the mortgage; and if a sale be had the proceeds will be applied in the first place to discharge the incumbrance, and the amount so applied deducted from the mortgage debt.[1] The possession of a third person, without right and without the consent of the grantor, does not constitute an incumbrance, or a breach of a covenant in the grantor's deed against incumbrances; consequently the purchaser who has given a mortgage for a portion of the purchase money cannot charge the mortgagee with rent or for damages equal to rent, for the period during which such third person has held possession.[2] Thus it is held that if there be a breach of the covenant against incumbrances by reason of the existence of tax liens, the amount of these would be a proper offset to the amount due on the mortgage.[3] But if for any reason a decree cannot be made for the mortgagee directing a deduction of the amount due on the prior incumbrances against which the mortgagor is protected by the covenant, as, for instance, when such incumbrances exceed the amount of the mortgage, the foreclosure suit upon the latter will be stayed until the property has been released from such incumbrances.[4] A provision in the purchase money mortgage for a release from a prior mortgage on the mortgagor's paying certain sums does not form an exception to the rule, that the grantor who has conveyed by deed having the usual covenants, including a covenant against incumbrances, must procure a release from such prior mortgage before he is entitled to a decree of foreclosure on the purchase money mortgage.[5]

1505. The breach by the mortgagee of an independent covenant is no defence to the foreclosure of a mortgage which

[1] § 1698, last clause; and see Smith *v.* Fiting, 37 Mich. 148, 151, per Marston, J.; Coffman *v.* Scoville, 86 Ill. 300.

[2] Dinsmore *v.* Savage, 68 Me. 191.

[3] Union Nat. Bank of Rahway *v.* Pinner, 25 N. J. Eq. 495; White *v.* Stretch, 22 N. J. Eq. 76; Van Riper *v.* Williams, 1 Green (N. J.) Ch. 407.

[4] Dayton *v.* Dusenbury, 25 N. J. Eq. 110.

[5] Stiger *v.* Bacon, 29 N. J. Eq. 442.

by its terms has become due and payable. Where, for instance, a mortgage is given in part payment of the purchase money of the premises, and at the same time the mortgagee executes a covenant to the purchaser that he will immediately procure releases of their title from certain persons named, who are reputed to have some claim upon the lands, the covenant is not dependent upon the payment of the mortgage money, and does not constitute with the mortgage a condition that the mortgage shall be paid when the releases shall be procured.[1]

1506. **But if the sale was effected by the vendor's fraud,** as by fraudulently procuring and exhibiting as true a false abstract of title, the purchaser may have the mortgage and the conveyance rescinded.[2] Fraud is a defence only when it was practised upon the defendant by the mortgagee or his agents, or with his knowledge.[3] The mortgagor may also set up a counter claim for damages occasioned by the fraud practised by the mortgagee in the sale of the premises to the mortgagor;[4] and if such damages exceed or equal the amount of the mortgage, the claim under the mortgage will be wholly defeated.[5]

A mere mistake of both parties as to the number of acres of land conveyed is no ground for defence to a mortgage given for the purchase money, there being no fraud or misrepresentation by the grantor.[6] But it would seem that a misrepresentation by the grantor, though made under a mistake as to his own rights, but

[1] Coursen *v.* Canfield, 21 N. J. Eq. 92. "The mortgagee," said the Chancellor, "has a right to say *in hæc fœdera non veni.* He might have been willing to bind himself in a covenant to procure releases which he knew were of little or no importance, a breach of which, if he should be unable to procure them, would subject him to small damages; but he might be unwilling to bind himself to forfeit $2,500 of the purchase money if he could not obtain the releases. The parties could have made the bargain either way. They chose to make, and did make, independent covenants. And there is no principle established in courts of equity by which an effect will be given to such covenants different from their legal effect, and independent covenants turned into conditional, because it will give better protection to a party, or will diminish litigation." And see Duryee *v.* Linsheimer, 27 N. J. Eq. 366.

[2] Booth *v.* Ryan, 31 Wis. 45; Robards *v.* Cooper, 16 Ark. 288; Furman *v.* Meeker, 24 N. J. Eq. 110.

[3] Aikin *v.* Morris, 2 Barb. Ch. 140.

[4] Allen *v.* Shackelton, 15 Ohio St. 145. The fraud alleged in this case was a misrepresentation of the boundaries of the lot, and the property covered by the mortgage.

[5] Grant *v.* Tallman, 20 N. Y. 191; Lathrop *v.* Godfrey, 6 Thomp. & C. 96; S. C. 3 Hun, 739.

[6] Northrop *v.* Sumney, 27 Barb. (N. Y.) 196.

acted upon by the purchaser, may be ground for relief in respect to a mortgage given for the purchase money.[1]

1507. An assignee of mortgage not due is not subject to this defence. Failure of title to a part of the premises for the purchase money of which the mortgage was given is no defence to an action by an assignee of the mortgage, who purchased it before due, and without notice of such failure.[2] And as already stated such defence would not, generally, avail against the original mortgagee, for the mortgagor's remedy would be on the covenants of the deed of purchase; but when the defence may be taken, the defendant may show that the assignment of the mortgage was colorable only, and that the mortgagee is still the equitable owner.[3]

1508. Validity of title may be made a condition precedent to the payment of the mortgage. Where the mortgage and note are conditioned that the note shall not be deemed due and payable until the title of the grantor, which was known to be defective as to a portion of the premises, is perfected, the mortgagor may set up the non-performance of this condition as a defence, and be allowed the value of that portion of the property in set-off; but he should be required at the same time to release whatever title he may have acquired to it by his deed.[4] A mortgage for purchase money has been regarded as conditional upon the title, even when the condition is not expressed. And so where a mortgage was given of one tract of land to secure the purchase money of another tract, which the mortgagee covenanted by his bond to convey with covenants of warranty, in an action to foreclose the mortgage, the failure of title in the vendor was declared a good defence, on the ground that the mortgagor only undertook to pay the mortgage on the condition that the mortgagee had title to the tract he agreed to convey.[5]

1509. Statute of limitations. — But the fact that the debt secured by the mortgage is barred by the statute of limitations is no defence to a bill to foreclose it.[6] In a few states, however, when an action on the note is barred, the remedy on the mort-

[1] Champlin *v.* Laytin, 6 Paige (N. Y.), 189; aff'd 18 Wend. 407.

[2] **834–847**; Silwell *v.* Kellogg, 14 Wis. 461.

[3] Lathrop *v.* Godfrey, 3 Hun (N. Y.), 739.

[4] Weaver *v.* Wilson, 48 Ill. 125.

[5] Smith *v.* Newton, 38 Ill. 230.

[6] See § **1204**. The effect of the statute of limitations is there fully examined. See, also, Haskell *v.* Bailey, 22 Conn. 573; Michigan Ins Co. *v.* Brown, 11 Mich. 265.

gage is gone. Distinct remedies may be pursued, but the same limitation applies to both.[1] Moreover, it is held that purchasers from the mortgagor subsequent to the execution of the mortgage may plead the statute of limitations as a defence to an action commenced after the statute has run against the debt secured.[2]

1510. Insanity of mortgagor. — If the sanity of the mortgagor is questioned, the burden is upon the defendant to show it; and he must show not merely an incapacity to make a valid contract at the date of its execution, but that the mortgagee knew and took advantage of the grantor's state of mind; otherwise, the consideration being paid, the security will be held good for the amount, although the insanity of the mortgagor be admitted or proved.

The mortgage deed must at the hearing be admitted or proved. If there is an attesting witness, the only question that need be asked of him is whether the mortgagor executed the deed in the witness's presence. It is not necessary, as in the case of a will, to prove that the person when he executed it was of sound mind. Although he has been found insane by an inquisition of lunacy, it is not the duty of the plaintiff to do more than prove the execution of the deed. The defendant must bring forward his own case to have the deed set aside, and the burden of proof lies on his side.[3]

1511. A recovery of judgment on the mortgage note or bond is no defence;[4] on the contrary such judgment may be relied upon as establishing the validity of the note or bond, and of the mortgage so far as the debt is concerned.[5] Neither is the pendency of a suit at law upon the mortgage debt any defence to a suit to foreclose the mortgage, unless made so by statute.[6] Of course a satisfaction of a judgment upon the debt would be a de-

[1] Coster *v.* Brown, 23 Cal. 142; Heinlin *v.* Castro, 22 Cal. 100; McCarthy *v.* White, 21 Cal. 495; Lord *v.* Morris, 18 Cal. 482. When there is no written obligation for the debt, see Union, &c. Co. *v.* Murphy, &c. Co. 22 Cal. 620.

[2] McCarthy *v.* White, 21 Cal. 495; Grattan *v.* Wiggins, 23 Cal. 16; Low *v.* Allen, 26 Cal. 141; Lent *v.* Shear, 26 Cal. 361.

[3] Jacobs *v.* Richards, 18 Beav. 300.

[4] § 936; Vansant *v.* Allmon, 23 Ill. 30; Jenkinson *v.* Ewing, 17 Ind. 505; Severson *v.* Moore, 17 Ind. 231; Goenen *v.* Schroeder, 18 Minn. 66.

[5] Hosford *v.* Nichols, 1 Paige (N. Y.), 220; Morris *v.* Floyd, 5 Barb. (N. Y.) 130; Clarke *v.* Bancroft, 13 Iowa, 320. See Batchelder *v.* Taylor, 11 N. H. 129.

[6] Suydam *v.* Bartle, 9 Paige (N. Y.), 294; Williamson *v.* Champlin, 1 Clarke (N. Y.), 9; Tappan *v.* Evans, 11 N. H. 311; Guest *v.* Byington, 14 Iowa, 30.

fence.[1] Under the Code of New York and the codes of some other states following that, proceedings in an action at law are suspended by a foreclosure suit;[2] and if judgment has been obtained at law, the remedy upon that must be first exhausted.[3]

1512. If the defendant set up satisfaction of the mortgage, he must clearly set out the defence in his answer, and his proofs must clearly substantiate his answer; and if both answer and the testimony be vague and uncertain the defence will fail.[4] Payment in whole or in part when properly set up is a good defence, not only for the mortgagor, but for junior incumbrancers.[5] It is a good answer to a foreclosure suit that the debt for the security of which the mortgage was given was an advancement or gift, and that accordingly the deed and note had been left with the mortgagor.[6] The defence that the complainant has received a piece of property, which should be applied on the mortgage debt, may be taken by answer without filing a cross-bill.[7]

1513. An agreement by the parties subsequent to the mortgage by which the rents of the mortgaged premises are assigned to the mortgagee to be collected by him, and applied to the debt until it is fully paid, is a good defence to a suit to foreclose;[8] and so is an agreement to rescind a sale of land, the purchase money of which the mortgage was given to secure, by which the land is to be reconveyed, and the mortgage surrendered;[9] or an agreement to extend the time of payment,[10] when made for a valuable consideration.[11] An agreement extending the time of payment is no part of the mortgage, and does not draw the mortgage within an act forbidding the foreclosure of a mortgage until one year after the last instalment is due.[12]

1514. As a general rule a defendant cannot object to an insufficient service, or the want of service, upon another de-

[1] Farmers' Loan & Trust Co. *v.* Reid, 3 Edw. (N. Y.) 414.

[2] Williamson *v.* Champlin, 1 Clarke (N. Y.) 9.

[3] Shufelt *v.* Shufelt, 9 Paige (N. Y.), 137; North River Bank *v.* Rogers, 8 Paige (N. Y.), 648.

[4] Suhr *v.* Ellsworth, 29 Mich. 57; Finlayson *v.* Lipscomb, 16 Fla. 751.

[5] Prouty *v.* Eaton, 41 Barb. (N. Y.) 409; Prouty *v.* Price, 50 Barb. (N. Y.) 344. See Edwards *v.* Thompson, 71 N. C. 177.

[6] Peabody *v.* Peabody, 59 Ind. 556.

[7] Edgerton *v.* Young, 43 Ill. 464.

[8] Angier *v.* Masterson, 6 Cal. 61.

[9] Bledsoe *v.* Rader, 30 Ind. 354.

[10] Dodge *v.* Crandall, 30 N. Y. 294; Andrews *v.* Gillespie, 47 N. Y. 487.

[11] Trayser *v.* Trustees of Ind. Asbury University, 39 Ind. 556. Tompkins *v.* Tompkins, 21 N. J. Eq. 338; Maryott *v.* Renton, Ib. 381.

[12] Wallace *v.* Hussey, 63 Pa. St. 24.

fendant who is not a necessary party to the suit.[1] Of course a defendant may take advantage of want of service, or of an ineffectual service, upon himself by a special appearance and plea in the suit; or he may in such case take no notice of the suit, as he would not be bound by the decree. A decree, however, which recites that process was duly served upon a defendant is *primâ facie*, if not conclusive, proof of notice to him of the foreclosure suit.[2] It has been held, however, that a person who stands in the relation of surety for the mortgage debt, and whose right it is to have the entire equity of redemption applied in the first place to the payment of it, may require the bringing in of parties having an interest in it, so as to make the sale perfect against all equities.[3]

1515. Bill of interpleader. — If the defendant, admitting the indebtedness, is in doubt to which of two claimants he ought to pay it, he should make his answer a bill of interpleader, placing himself indifferently between them.[4]

The mortgagor cannot set up by cross-bill the defence that the notes secured by the mortgage were improperly made payable to one of two partners who has misappropriated the funds of the firm, and is indebted to his copartner.

[1] Mims *v.* Mims, 35 Ala. 23; Semple *v.* Lee, 13 Iowa, 304.

[2] Carpenter *v.* Millard, 38 Vt. 9.

[3] Kortright *v.* Smith, 3 Edw. (N. Y.) 402.

[4] Harrison *v.* Pike, 48 Miss. 46.

CHAPTER XXXIII.

THE APPOINTMENT OF A RECEIVER.

I. When a receiver will be appointed, 1516–1534. | II. Duties and powers of a receiver, 1535–1537.

1. *When a Receiver will be appointed.*

1516. General principles.[1] — A receiver of the rents and profits may be appointed *pendente lite* when the mortgage is insufficient, and the party personally liable is insolvent; or when it is provided by the deed that the mortgagee shall have the rents and profits after a default; for otherwise the owner of the equity of redemption, in all those states where the mortgagee's right of entry upon the happening of a default is taken away, being entitled to the rents and profits until a sale under decree of court, and possession under it given to the purchaser, the holder of the mortgage would be deprived of a valuable part of his security.[2] The mere fact that there has been a default in the payment of the debt is no ground for the appointment of a receiver,[3] unless there be a stipulation in the mortgage that the mortgagee shall have the rents.[4] This right to have a receiver of the rents appointed pending the litigation depends upon the general principle of equity, that the purpose of such an appointment is to preserve

[1] For the law relating to receivers of railroad companies, see Jones on Railroad Securities; the appointment and jurisdiction of such receivers, §§ 456–492; their rights and liabilities, §§ 493–530; their debts and certificates, §§ 533–546.

[2] Bank of Ogdensburg *v.* Arnold, 5 Paige (N. Y.), 40; Astor *v.* Turner, 11 Paige (N. Y.), 436; Sea Insurance Co. *v.* Stebbins, 8 Paige (N. Y.), 566; Shotwell *v.* Smith, 3 Edw. (N. Y.) Ch. 588; Warner *v.* Gouverneur, 1 Barb. (N. Y.) 38; Clason *v.* Corley, 5 Sandf. (N. Y.) 447; Mitchell *v.* Bartlett, 51 N. Y. 447; Howell *v.* Ripley, 10 Paige (N. Y.), 43; Frelinghuysen *v.* Colden, 4 Ib. 204; Syracuse Bank *v.* Tallman, 31 Barb. (N. Y.), 201; Whitehead *v.* Wooten, 43 Miss. 523; Myers *v.* Estell, 48 Miss. 372; Douglass *v.* Cline, 12 Bush (Ky.), 608; Newport, &c. Bridge Co. *v.* Douglass, Ib. 673. For the reason intimated in the text, the practice of appointing a receiver is chiefly confined to those states where the mortgagee's right of entry upon default is taken away.

[3] Williams *v.* Robinson, 16 Conn. 517.

[4] Whitehead *v.* Wooten, 43 Miss. 523; Morrison *v.* Buckner, 1 Hempst. 442.

the property, so that it may be appropriated to satisfying the decree of court. A mortgagee or trust creditor, to be entitled to a receiver, must show that it is necessary to interfere with the mortgagor's possession on account of the inadequacy of the security and the insolvency of the mortgagor.[1] This relief is given with great caution, and only when the mortgagee has no other adequate means of protecting his rights.[2] The necessity for this protection and the special grounds and reasons for asking it must be clearly alleged and proved before it will be granted.[3] The appointment is a matter for the sound discretion of the court.[4]

If the mortgagor is applying the rents and profits to keep down the interest on the first mortgage, the court will not appoint a receiver on the application of the second mortgagee, although it may appear that the security is inadequate and the mortgagor insolvent.[5] If the first mortgagee be in possession, he cannot be disturbed; and when a receiver is appointed on the application of a subsequent mortgagee, it must be with the consent of prior incumbrancers or without prejudice to their rights.[6] The first mortgagee may at any time enter or bring ejectment against such receiver.

The appointment of a receiver is an equitable remedy, and has been said to be in effect an equitable execution.[7] This remedy bears the same relation to courts of equity that proceedings in attachment bear to courts of law. "The issuing of an attachment and the appointment of a receiver in a civil action are both proceedings which are merely ancillary or auxiliary to the main action. The action may be prosecuted to final judgment, either with or without such proceedings. These auxiliary proceedings are merely intended to secure the means for satisfying the final judgment in case the plaintiff should succeed in the action, and

[1] Shotwell *v.* Smith, 3 Edw. (N. Y.) Ch. 588; Quincy *v.* Cheeseman, 4 Sandf. (N. Y.) Ch. 405; Pullan *v.* Cincinnati, &c. R. R. Co. 4 Biss. 35.

[2] First Nat. Bank of Sioux City *v.* Gage, 79 Ill. 207; Cortleyeu *v.* Hathaway, 3 Stockt. (N. J.) 39; Syracuse Bank *v.* Tallman, 31 Barb. (N. Y.) 201.

[3] Morrison *v.* Buckner, Hemp. (Tenn.) 442; Callanan *v.* Shaw, 19 Iowa, 183; Hackett *v.* Snow, 10 Ir. Eq. 220; First Nat. Bank of Sioux City *v.* Gage, 79 Ill. 207.

[4] Cone *v.* Paute, 12 Heisk. (Tenn.) 506.

[5] Cortleyeu *v.* Hathaway, 3 Stockt. (N. J.) 39.

[6] Bryan *v.* Cormick, 1 Cox's Eq. Ca. 422; Dalmer *v.* Dashwood, 2 Ib. 378.

[7] Jeremy's Eq. Jur. 249.

they can only be resorted to where the special circumstances exist which the law prescribes for their institution." [1]

1517. A receiver may be appointed on the application of the mortgagor as against the mortgagee in possession, when there is equitable ground for it; as, for instance, when the mortgagee is irresponsible, and the rents and profits are liable to be lost, or he is committing waste. But if he be responsible, and anything remains due to him on the mortgage debt, the appointment will not be made; and his affidavit that there is a balance due him will be sufficient to prevent the appointment, for the question of indebtedness will not be tried on such an application; and when the question depends upon a settlement of the mortgagee's account, it can be determined only upon a suit in equity to redeem.[2]

A receiver will not be appointed in a proceeding to enforce a vendor's implied lien. It is no part of the contract of sale, either express or implied, that the vendor shall appropriate anything but the land itself by sale, for the satisfaction of his purchase money; and it is a part of the implied contract that the purchaser is entitled to the possession until the land is sold to enforce the lien.[3]

1518. This remedy is regarded as peculiarly appropriate in cases of mortgages of leasehold estates, inasmuch as the value of such a security consists chiefly in the right to receive the rents, and the delay of protracted litigation may wholly destroy this value.[4] In such a case there may be urgent need of the aid of a receiver by reason of the mortgagor's failure to pay the rent, and the landlord's threatening an eviction; and a receiver may consequently be appointed before answer, and even before the service of process upon the defendant mortgagor.[5]

1519. The English rule, which prevailed before the right was made general by a recent statute,[6] was that a mortgagee who had

[1] Cincinnati, Sandusky & Cleveland R. R. Co. *v.* Sloan, 31 Ohio St. 1, per White, J.

[2] Bolles *v.* Duff, 35 How. (N. Y.) Pr. 481; Patten *v.* Accessory Transit Co. 4 Abb. (N. Y.) Pr. 237; Quinn *v.* Brittain, 3 Edw. (N. Y.) 314.

[3] Morford *v.* Hamner, 59 Tenn. 391.

[4] Astor *v.* Turner, 2 Barb. (N. Y.) 444.

[5] Barrett *v.* Mitchell, 5 Ir. Eq. 501.

[6] 23 & 24 Vict. c. 145, §§ 11–32. This statute applies to all mortgages, those containing powers of sale as well as those that do not. It enables the mortgagee in all cases where the payment of the principal is in arrear one year, or the interest six months, or after any omission to pay any insurance premium, which, by the terms of the deed, ought to be paid, to obtain the appointment of a receiver of the rents and profits of the estate. He is deemed the agent of the mortgagor or

a legal estate and might enter after a default, or recover possession at law, was not entitled to a receiver of the rents.[1] A subsequent mortgagee, however, having an equitable estate only, and being unable to enter as against the first mortgagee, was held to have a better ground for the application, and was therefore generally entitled to a receiver when proper occasion for the appointment was shown.[2] This distinction was clearly established by Lord Eldon, upon the ground that equity will not interfere when the mortgagee has an adequate remedy at law.[3] When, under peculiar circumstances, the reason for this distinction fails, and the mortgagee, although having the legal estate, is unable to take possession, he is entitled to this relief in equity; as where a mortgage was given by a surety in addition to one given by the principal debtor, yet with a proviso that the mortgagee should not have recourse to the surety's estate or be at liberty to sell it until the estate primarily liable shall prove an insufficient security.[4]

1520. In the United States, courts of equity have generally exercised their powers in appointing receivers with much more freedom. In some courts there has been a disposition to leave a mortgagee who has the legal title, or the right at law to enter and take possession of the mortgaged premises, to pursue his legal remedy without aid from a court of equity.[5] There must be some-

owner of the property, who is solely responsible for his acts or defaults, unless otherwise provided for in the mortgage. The statute regulates his duties, powers, and compensation. This right to obtain the appointment of a receiver is independent of any action to foreclose. It is not unusual to provide in the mortgage deed for the appointment of a receiver. See Jolly *v.* Arbuthnot, 4 De G. & J. 224; Law *v.* Glenn, L. R. 2 Ch. Ap. 634.

[1] Berney *v.* Sewell, 1 J. & W. 647; Cox *v.* Champneys, Jac. 576; Sturch *v.* Young, 5 Beav. 557; Ackland *v.* Gravener, 31 Beav. 482.

[2] Anderson *v.* Kemshead, 16 Beav. 329; Dalmer *v.* Dashwood, 2 Cox, 378; Greville *v.* Fleming, 2 Jo. & Lat. 335; Meaden *v.* Sealey, 6 Hare, 620.

[3] Berney *v.* Sewell, *supra.* See, also, observations of Lord Romilly in Ackland *v.* Gravener, *supra,* where he says that "though the court refuses to grant the receiver in cases where there is no question, and the mortgagee can take possession at once, there being no defence whatever to his action of ejectment, still if the mortgagee cannot take possession, as if, for instance, there is a prior mortgagee, who refuses to take possession, then, at the instance of the second mortgagee, the court does grant a receiver."

[4] Ackland *v.* Gravener, *supra.*

[5] Oliver *v.* Decatur, 4 Cranch C. C. 458; Williamson *v.* New Albany R. R. Co. 1 Biss. 201; Union Trust Co. *v.* St. Louis, &c. R. R. Co. 4 Cent. L. J. 585; Frisbie *v.* Bateman, 24 N. J. Eq. 28; Best *v.* Schermier, 2 Halst. Ch. (N. J.) 154; Cortleyeu *v.* Hathaway, 11 N. J. Eq. 39. In the last named case the court appointed a receiver upon the application of a subsequent mortgagee, — showing the insolvency of the mortgagor, inadequacy of the security, the

thing more than the inadequacy of the security and the insolvency of the mortgagor to warrant the appointment, at the instance of a mortgagee having the legal estate. Other special circumstances calling for this equitable relief must be shown; either that the mortgagee has only an equitable estate and cannot enter and take possession, or that, by reason of the fraud or negligence of the person in possession, the security is likely to be impaired; as, for instance, by allowing the taxes to go unpaid, whereby a lien is created superior to that of the mortgage, and which may, if not extinguished, extinguish the mortgage.[1]

1521. The prevailing rule, however, is that a receiver will be appointed upon the application of a mortgagee without reference to his legal rights, whenever sufficient equitable grounds for this relief are shown; which are in general that the premises are an inadequate security for the debt, and the mortgagor or other person in possession, who is personally liable for the debt, is unable to make good the deficiency.[2]

It is true that in half or more of the states and territories the mortgagee has no legal rights that would aid him in such case, and resort to equity is the only remedy; but it is equally an appropriate remedy in some states in which the mortgagee has a legal

sale of the premises to an insolvent purchaser, who had agreed as part of the consideration to reduce the mortgage debt, and upon obtaining possession refused to keep his agreement, and offered to sell the property for the amount of the incumbrances after taking off the crops. Mr. Chancellor Williamson, remarking upon the general rules governing the appointment of a receiver, said that the courts of New Jersey had not adopted the rule of appointing a receiver, simply on the ground of the inadequacy of the security and the insolvency of the mortgagor. "This court has gone upon the ground, that where a man takes a mortgage security for his debt, and permits the mortgagor to remain in possession, if there is a default in payment, the mortgagee must appropriate the property in the usual way to the payment of the debt. If he is a first mortgagee and wishes possession, he must take his legal remedy by ejectment. If he is a second mortgagee, he takes his security with the disadvantages of a second incumbrancer." See, also, McLean *v.* Presley, 56 Ala. 211, where a receiver was denied to a mortgagee after he had himself, without right, become purchaser at a sale under a power in the mortgage.

[1] Mahon *v.* Crothers, 28 N. J. Eq. 567; Cone *v.* Paute, 12 Heisk. (Tenn.) 506; Johnson *v.* Tucker, 2 Tenn. Ch. 398.

[2] Bank of Ogdensburgh *v.* Arnold, 5 Paige (N. Y.), 39; Shotwell *v.* Smith, 3 Edw. (N. Y.) Ch. 588; Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.), 566; Warner *v.* Gouverneur, 1 Barb. (N. Y.) 38; Jenkins *v.* Hinman, 5 Paige (N. Y.), 309; Syracuse Bank *v.* Tallman, 31 Barb. (N. Y.) 201; Patten *v.* Accessory Transit Co. 4 Abb. (N. Y.) Pr. 235; S. C. 13 How. 502; Bolles *v.* Duff, 35 How. (N. Y.) Pr. 481; Smith *v.* Tiffany, 13 Hun (N. Y.), 671. This broader rule seems to be favored in Mississippi. Myers *v.* Estell, 48 Miss. 372, per Simrall, J.; Whitehead *v.* Wooten, 43 Miss. 526; Phillips *v.* Eiland, 52 Miss. 721.

remedy for recovering possession. In several states there is a statutory provision in the same terms, that in an action by a mortgagee for the foreclosure of his mortgage, and the sale of the mortgaged property, a receiver may be appointed where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.[1] This, however, is merely an enactment of the general equitable rule.

1522. The appointment as affected by statutes. — As already seen, by the statutory provisions of many of the states the mortgagee is not in any case entitled to possession of the mortgaged property upon a default, but the mortgagor may still retain possession until a sale is made under a decree in a foreclosure suit, and in some states even until the lapse of a period of redemption allowed after the sale. Some of these statutes would seem to prevent the appointment of a receiver in any case; while others might be regarded as giving special occasion for it, because they prevent the mortgagee's obtaining possession and protecting his rights, as he might under a mortgage conveying the legal title at common law. Even statutes precisely alike have in different states been interpreted as operating in opposite ways upon the generally received rules for the appointment of receivers in foreclosure suits; for while in Florida and Nevada the possession which the law allows to the mortgagor until a foreclosure sale is regarded as subordinate to the equitable rights of the mortgagee to the rents and profits under the condition of things which ordinarily authorizes the appointment of a receiver in equity, and while the statute confining the mortgagee to one remedy in case of default, which is an equitable suit for foreclosure and sale of the property, and a judgment for any deficiency, is held to be a reason for adopting the practice of appointing a receiver when there were the usual grounds for the appointment;[2] in California,

[1] **California**: Codes & Stats. 1876, § 10, 564. **Arkansas**: Dig. 1874, p. 838, § 4810. **Kentucky**: Code of Prac. 1876, § 299. **Dakota T.**: Code of Civil Procedure, 1877, § 219. **Montana T.**: Laws, 1877, p. 93; Code of Civil Procedure, § 221. **Washington T.**: Laws, 1877, p. 40. **Wyoming T.**: Comp. Laws, 1877, c. 13, § 253, of Civil Code. **Ohio**: R. S. 1860, p. 1019. **New York**: in similar terms. 3 R. S. 1875, 511, § 244.

[2] Pasco *v.* Gamble, 15 Fla. 562; Hyman *v.* Kelly, 1 Nev. 179. The court say, that the legislature having forbid the mortgagee pursuing the common law remedy of ejectment is rather a reason for a more liberal

on the other hand, it was held that by reason of the statute the practice of appointing a receiver to collect the rents pending the suit was not applicable; that the mortgagor continued to be the owner of the estate, and is entitled to the possession of it until it passes to some one else under a foreclosure sale.[1] In Michigan, also, the mortgagor being entitled by statute to the possession and consequently to the rents and profits of the mortgaged premises, until he is divested by foreclosure and sale, it is held that it is not competent to cut short his right in this respect by the appointment of a receiver in the foreclosure suit.[2]

1523. A subsequent mortgagee cannot have a receiver appointed to the prejudice of any prior incumbrancer, to whom something is due, in case such incumbrancer is in actual possession; and whenever an appointment is made, it is without prejudice to the right of any such prior incumbrancer to take possession.[3] The possession of the prior mortgagee, and his application of the rents to the debt due him, may be as much to the advantage of the subsequent mortgagee as his own would be. If the subsequent mortgagee insists upon obtaining possession himself, his only course is to redeem the estate from the prior incumbrance by paying it off;[4] and this may be rendered necessary in case the prior mortgagee in possession does not apply the income of the property to the payment of the interest and principal of the mortgage debt, but applies it to other debts of the mortgagor, or pays it over to him. A receiver may even be appointed on the application of the mortgagor, when his grantee or mortgagee

exercise of the chancellor's powers to protect the security. They expressly dissent from the case in California next cited. Guy *v.* Ide, 6 Cal. 99. See statute, § 1521. In like manner an express stipulation in the mortgage that the mortgagor may retain possession of the property until foreclosure prevents the appointment of a receiver. Chadbourn *v.* Henderson, 58 Tenn. 460.

[1] Ibid.

[2] Wager *v.* Stone, 36 Mich. 364.

[3] 1 Fisher's Law of Mortg. 408; Rowe *v.* Wood, 2 Jac. & W. 553; Berney *v.* Sewell, 1 Jac. & W. 647; Hiles *v.* Moore, 15 Beav. 175; Davis *v.* Duke of Marlborough, 2 Sw. 137; Dalmer *v.* Dashwood, 2 Cox, 378; Norway *v.* Rowe, 19 Ves. 153; Quinn *v.* Brittain, 3 Edw. Ch. 314; Trenton Banking Co. *v.* Woodruff, 2 Green (N. J.) Ch. 210; Wiswall *v.* Sampson, 14 How. 64. In Berney *v.* Sewell, *supra*, Lord Eldon said: "I remember a case where it was much discussed whether the court would appoint a receiver, when it appeared by the bill that there was a prior mortgagee who was not in possession. I have a note of that case. There Lord Thurlow made the appointment without prejudice to the first mortgagee's taking possession; and that was afterwards followed by Lord Kenyon."

[4] Trenton Banking Co. *v.* Woodruff, 3 N. J. Eq. (2 Green) 210.

is in possession and is insolvent, and it is probable that the rents and profits will be lost through his management.[1]

1524. Consent of prior mortgagee. — It is not necessary, as was at first held by Lord Thurlow,[2] that the first mortgagee's consent should be obtained before a receiver can be appointed on the application of an equitable mortgagee.[3] If he is not in possession the application will be allowed; and he cannot prevent it in any way except by taking possession himself.[4] But, as already stated, the appointment is made without prejudice to those who have prior rights in the property.[5] If the prior mortgagee has the legal estate he may take possession at any time; and if he has an equitable estate only his equitable rights are protected by the court. The receiver appointed at the instance of a junior incumbrancer is entitled to receive the rents and profits until the prior mortgagee takes possession, or has a receiver in aid of his own suit to foreclose.[6] It is held, however, that if the prior mortgagee commences proceedings in a different court, a receiver already appointed by another court on the application of a junior mortgagee will not be interfered with while such mortgagee is in actual possession, and administering the property under the directions of that court.[7]

1525. So long as anything is due the prior mortgagee, however small the amount, the possession will not be taken from him.[8] This is stated by Lord Eldon very forcibly. "If you recollect in Mr. Beckford's case, I went to the every utmost; I said then that if Mr. Beckford would swear that there was sixpence due to him, I would not take away the possession from him. If

[1] Williams *v.* Robinson, 16 Conn. 517, 524; Bolles *v.* Duff, 35 How. (N. Y.) Pr. 481. See § 1517.

[2] Phipps *v.* Bishop of Bath, Dick. 608.

[3] Bryan *v.* Cormick, 1 Cox, 422.

[4] Silver *v.* Bishop of Norwich, 3 Swans. 112, note.

[5] Dalmer *v.* Dashwood, 2 Cox, 378; Davis *v.* Duke of Marlborough, 2 Swans. 137, 165; Norway *v.* Rowe, 19 Ves. 153.

[6] Washington Life Ins. Co. *v.* Fleischauer, 10 Hun (N. Y.), 117; Howell *v.* Ripley, 10 Paige (N. Y.), 43; Sanders *v.* Lord Lisle, Ir. Rep. 4 Eq. 43.

In Virginia a receiver is regarded as acting in the interest of all parties, and no one having a right prior to that of the plaintiff can afterwards take possession. He must finally account according to the priorities of the different incumbrancers. Beverley *v.* Brooke, 4 Grat. 187.

[7] Young *v.* R. Co. 3 Am. L. T. R. N. S. 91; 2 Woods, 606.

[8] Chalmers *v.* Goldwin, cited and commented upon in Quarrell *v.* Beckford, 13 Ves. 377; Hiles *v.* Moore, 15 Beav. 175; Codrington *v.* Parker, 16 Ves. 469; Faulkener *v.* Daniel, 10 L. J. N. S. Ch. 33; Trenton Banking Co. *v.* Woodruff, 2 Green (N. J.) Ch. 210. In this last case the priority of the first mortgagee in possession was contested.

there is anything due, I cannot substitute another security for that which the mortgagee has contracted for. I know no case where the court has appointed a receiver against a mortgagee in possession, unless the parties making the application will pay him off, and pay him according to his demand as he states it himself." [1] If he insists by his answer that he has not been fully paid, the court will not upon hearing of the motion try the question whether any balance is due.[2] But if he refuses to accept what is due, or will not swear that something is due, a receiver will be appointed;[3] and it being his business to keep his accounts, if these be so incomplete that he cannot determine whether anything is due, the court may assume that nothing is due and act accordingly.[4]

1526. As a general rule, the appointment cannot be made until a bill has been filed for foreclosure, and the merits of the case have been disclosed by the defendant's answer; [5] though under circumstances rendering an immediate appointment necessary to prevent threatened loss and injury to the property, an appointment may be made before the defendant's appearance,[6] and even before service upon him,[7] and especially if his residence be unknown.[8] The appointment may be made at the hearing, though not prayed for by the bill, if the facts stated in it are sufficient to authorize it.[9] On petition supported by the proper proof, the appointment may be made at any time during the pendency of the suit. It is against the policy of the law that a mortgagee should receive the appointment, and if he does he is not entitled to compensation.[10]

1527. Defences to the application. — To prevent the appointment of a receiver the mortgagor must either make a special affidavit of merits, or show that the property is sufficient to secure the mortgage.[11] His affidavit that he has a good defence, without

[1] Berney *v.* Sewell, 1 Jac. & W. 647.

[2] Rowe *v.* Wood, 2 Jac. & W. 553.

[3] Berney *v.* Sewell, *supra.*

[4] Codrington *v.* Parker, 16 Ves. 469; Hiles *v.* Moore, 15 Beav. 175.

[5] Astor *v.* Turner, 2 Barb. 444; 3 How. (N. Y.) Pr. 225; 11 Paige, 436; Kattenstroth *v.* Astor Bank, 2 Duer (N. Y.), 632; Anon. 1 Atk. 578; Morrison *v.* Buckner, Hemp. 443; Hardy *v.* McClellan, 53 Miss. 507.

[6] *Ex parte* Whitfield, 2 Atk. 315; Neaden *v.* Sealey, 6 Hare, 620; Caillard *v.* Caillard, 25 Beav. 512; McCarthy *v.* Peake, 9 Abb. (N. Y.) Pr. 164.

[7] Barrett *v.* Mitchell, 5 Ir. Eq. 501.

[8] Dowling *v.* Hudson, 14 Beav. 423.

[9] Malcolm *v.* Montgomery, 2 Mol. 500; Osborne *v.* Harvey, 1 Y. & C. C. C. 116.

[10] Langstaffe *v.* Fenwick, 10 Ves. 405; Scott *v.* Brest, 2 Tenn. R. 238.

[11] Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.), 565; Bancker *v.* Hitchcock, 1 Ch. Dec. (N. Y.) 88; Lofsky *v.* Maujer, 3

stating what it is, is no answer to the application for a receiver.[1] If he has conveyed the land subject to the mortgage, he is in no position to oppose the appointment.[2] Only those whose rights would be affected by the appointment can oppose it. Upon a bill to restrain waste by the mortgagor, there is no occasion for a receiver; the injunction is sufficient.[3]

After a receiver has once been appointed without opposition made at the time, an objection raised at a later stage of the case that the application was improperly allowed will not be regarded.[4]

1528. The application should show the defendant in possession, and notice of the application should be given him unless he has defaulted in the action,[5] inasmuch as in general the court is warranted in appointing a receiver only when the property is in possession of a party to the foreclosure suit, either by himself or his tenant. If the premises are in possession of a tenant who is not himself a party to the suit, he is not disturbed in his possession, but is directed to attorn to the receiver.[6] When the tenant is before the court, the receiver is appointed without restriction.[7]

There can be no appointment of a receiver of mortgaged lands after an assignee in bankruptcy of the estate of the owner of the equity of redemption has been appointed and has taken possession of the mortgaged property. The assignee is clothed with functions similar to those of a receiver.[8]

1529. The plaintiff must show by affidavit the amount due after the allowance of all just credits, if decree has been taken *pro confesso*. The statement in the bill is not enough.[9] The affidavit must also show that the defendant is in possession. If the amount actually due is in dispute, and the answer denies the allegations as to the inadequacy of the security, the court will not interfere with the possession.[10]

1530. Generally the mortgage debt must be already due

Sandf. (N. Y.) Ch. 69; Darcy *v.* Blake, 1 Molloy, 247; Shepherd *v.* Murdock, 2 Ib. 531; Leaby *v.* Arthur, 1 Hogan, 92.

[1] Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 565.

[2] Wall St. Fire Ins. Co. *v.* Loud, 20 How. (N. Y.) Pr. 95.

[3] Robinson *v.* Preswick, 3 Edw. (N. Y.) Ch. 246.

[4] Post *v.* Dorr, 4 Edw. (N. Y.) Ch. 412.

[5] High on Receivers, § 660; Sea Insurance Co. *v.* Stebbins, 8 Paige (N. Y.), 565.

[6] Sea Insurance Co. *v.* Stebbins, *supra;* Smith *v.* Tiffany, 13 Hun (N. Y.), 671.

[7] Keep *v.* Michigan Lake Shore R. R. Co. 6 Chicago Leg. News, 101.

[8] *In re* Bennett, 2 Hughes, 156.

[9] Rogers *v.* Newton, 2 Ir. Eq. 40.

[10] Callanan *v.* Shaw, 19 Iowa, 183.

to entitle the mortgagee to have a receiver appointed; at any rate there must have been such a default as entitles him to commence an action to foreclose the mortgage.[1] Yet a receiver has been granted under peculiar circumstances when the mortgagee was not entitled to a foreclosure, and merely to keep down the interest on the mortgage; as in a case where the principal debt did not become due until after the mortgagor's death.[2]

1531. While a receiver is usually appointed only after the filing of a bill to foreclose the mortgage, and while it is pending,[3] yet under circumstances showing an urgent occasion for it, a receiver has been appointed after the decree for foreclosure, as where there was danger that a tenant in possession might by further delay acquire rights by adverse possession.[4] Generally the appointment does not affect the rights of persons who are not parties to the suit; and will not be made unless the person in possession is either a party to the suit or his tenant.[5]

1532. To warrant an appointment of a receiver it must be shown both that the property itself is an inadequate security, and that the debt or the deficiency after the application of the proceeds of the security could not be collected of the mortgagor or other person liable for it.[6] The property may be inadequate security for all the incumbrances upon it, and yet be sufficient for the particular mortgage which is the subject of the foreclosure suit.[7]

[1] Bank of Ogdensburgh *v.* Arnold, 5 Paige (N. Y.), 38; Lofsky *v.* Maujer, 3 Sandf. (N. Y.) Ch. 69; Quincy *v.* Cheeseman, 4 Sandf. (N. Y.) Ch. 405.

[2] Burrowes *v.* Molloy, 2 Jo. & Lat. 521; S. C. 8 Ir. Eq. 482; Newman *v.* Newman, 2 Bro. C. C. 92, note 6; Latimer *v.* Moore, 4 McLean, 111.

[3] Adair *v* Wright, 16 Iowa, 385; and see Barlow *v.* Gains, 8 Beav. 329.

[4] Thomas *v.* Davies, 11 Beav. 29; and see Hackett *v.* Snow, 10 Ir. Eq. 220.

[5] Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.), 565; and see Zeiter *v.* Bowman, 6 Barb. (N. Y.) 133.

[6] Astor *v.* Turner, 2 Barb. (N. Y.) 444; Quincy *v.* Cheeseman, 4 Sandf. (N. Y.) Ch. 405; Hyman *v.* Kelly, 1 Nev. 179; Brown *v.* Chase, Walk. (Mich.) 43; Adair *v.* Wright, 16 Iowa, 385; Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.), 565; Myers *v.* Estell, 48 Miss. 403; Keep *v.* Mich. Lake Shore R. R. Co. 6 Chicago L. N. 101; Pullan *v.* Cincinnati, &c. R. R. Co. 4 Biss. 35; Morrison *v.* Buckner, Hemp. 442.

[7] Warner *v.* Gouverneur, 1 Barb. (N. Y. 36, per Edmonds, J. "The allegation is that they are not an adequate security for 'all just incumbrances' on them. All of the just incumbrances, it would seem, amount to near $70,000, while the claim of the defendants is not more than half that sum. And while the defendants do not say whether the premises are or are not adequate security for the amount due to them, the mortgagor on the other hand avers that they are sufficient for that amount. There is, therefore, no ground for the appointment of a receiver."

1533. There may be other and additional grounds for the application; but these two are the principal ones which are essential in every case; and usually no others are essential if these are fully and clearly alleged and proved. Coupled with these there may be strong grounds for interference, in the fact that the taxes have been suffered to remain unpaid, and the property to be sold to satisfy them, and that the insurance has been neglected;[1] or that there is a contest as to whether a large portion of the property claimed under the mortgage is really covered by it;[2] or that there is fraud or bad faith on the mortgagor's part in the management of the property, as in appropriating the rents and profits to other purposes than keeping down the interest on the incumbrances, or in permitting the property to depreciate and the buildings to go to decay.[3]

1534. In determining whether the security is adequate, the proper criterion in respect to city property is the rental of it rather than the price it would be likely to sell for. The income of improved property in large towns is considered a fair test of its value as an investment.[4] Of course there may be circumstances which in particular cases will modify or make inapplicable such a test.

2. *Duties and Powers of a Receiver.*

1535. A receiver is the representative of all parties in interest; of the mortgagee, the mortgagor, and all holding under them, and all having rights superior to theirs. The receiver of a bankrupt corporation represents not only the mortgagees, but the assignees in bankruptcy, the creditors, and stockholders as well.[5] He is not allowed to act with reference to the mortgaged property in any other relation inconsistent with his duties as receiver. If he is also mortgagee, he will not be permitted to deal with the property in any way inconsistent with his duty as a receiver acting in the interest of all parties concerned.[6]

But a receiver of a corporation empowered to enforce a mort-

[1] Wall St. Fire Ins. Co. *v.* Loud, 20 How. (N. Y.) Pr. 95.

[2] Wall St. Fire Ins. Co. *v.* Loud, *supra.*

[3] Per Williamson, Chancellor, in Cortleyeu *v.* Hathaway, 11 N. J. Ch. 39.

[4] Shotwell *v.* Smith, 3 Edw. (N. Y.) 588.

[5] Sutherland *v.* Lake Superior Ship Canal R. & I. Co. 9 Nat. Bank. Reg. 307; Davis *v.* Gray, 16 Wall. 204, 217.

[6] Bolles *v.* Duff, 54 Barb. (N. Y.) 215; 37 How. (N. Y.) Pr. 162; Iddings *v.* Bruen, 4 Sandf. (N. Y.) Ch. 417.

gage belonging to it may bid off the property to save a sacrifice of it. He succeeds to the rights and powers of the company in this respect.[1]

He should not involve the estate in any expense without the authority of the court; nor without such sanction bring suits or defend them.[2] He should always apply to the court before exercising unusual discretion.[3]

His possession is the possession of the court, and without its authority no one can directly or indirectly interfere with the property.[4] Like a trustee, he is bound to exercise such care over the property as a prudent man would take of his own.[5]

A receiver who acts in good faith, but under a mistake as to the extent of his powers, is not, it would seem, liable for his acts. But if he wilfully and corruptly exceeds his powers, he would be liable for the actual damage sustained by his conduct.[6] The receiver of a railroad may be empowered by the court to borrow money to complete unfinished portions of the road, to issue bonds, and make them a first lien upon the property of the road.[7]

A receiver cannot be sued without leave of the court which appointed him, first obtained. That court has jurisdiction of all matters in controversy affecting the property in the hands of the receiver, and may draw to itself all controversies to which the receiver can be made a party. This court is not compelled to take jurisdiction of all such matters, but may assert its right to do so. By acting upon the parties it may prevent their proceeding in other courts against the receivers. If leave be not obtained upon motion to prosecute an independent suit at law or in equity against a receiver, the proper mode of proceeding is to apply for the appropriate remedy against the receiver by petition in the cause in which the receiver was appointed, and not by original bill. Thus a bill in equity does not lie against a receiver to restrain

[1] Jacobs *v.* Turpin, 83 Ill. 424.

[2] Wynn *v.* Lord Newborough, 3 Bro. C. C. 87; Ward *v.* Swift, 6 Hare, 313; Swaby *v.* Dickon, 5 Sim. 631; Cowdrey *v.* Galveston R. R. Co. 93 U. S. 352; Ketchum *v.* Pacific R. R. Co. 3 Cent. L. J. 380.

[3] Parker *v.* Browning, 8 Paige (N. Y.), 388.

[4] Russell *v.* East Anglian Ry. Co. 3 Mac. & G. 104; Ames *v.* Trustees of Birkenhead Docks, 20 Beav. 353; Noe *v.* Gibson, 7 Paige (N. Y.), 513; Albany City Bank *v.* Schermerhorn, 9 Ib. 372.

[5] Per Lord Eldon, 1 J. & W. 247; 1 Fisher's Law of Mort. 444.

[6] Stanton *v.* Ala. & Chattanooga R. R. Co. 2 Woods, 506, 518.

[7] Kennedy *v.* St. Paul & Pacific R. R. Co. 2 Dill. 448.

him from foreclosing a mortgage by sale under a power on the ground that the mortgage was obtained by fraudulent representations and is void, but relief should be sought by petition.[1]

1536. Receiver's claim to the rents. — By the appointment of a receiver the mortgagee obtains an equitable claim not only upon the rents and profits actually due at the time, but also upon the rents to accrue; and his right to them is superior to that of the mortgagor's assignee in bankruptcy,[2] or to that of any one else claiming under the mortgagor, as, for instance, his grantee who has bought subject to the mortgage, even when he has taken a note with personal security for the rent.[3] But the receiver cannot call upon the mortgagor, or a junior mortgagee, to refund rents collected before the appointment of the receiver;[4] nor is the receiver entitled to receive such rents.[5]

The tenants of the premises may be compelled to attorn to the receiver.[6] So also a purchaser of the premises from the mortgagor may be directed to pay to the receiver an occupation rent.[7] If the person in possession refuses to attorn, the court may on motion pass an order directing him to do so, although he was not made a party to the suit in the first instance.[8] If he disobeys the order of court he may be proceeded against for contempt.[9] The court will not support a receiver in using forcible or violent means to assert his rights.[10]

1537. Payment discharges. — It is the right of the mortgagor whose property has been placed in the hands of a receiver pending a suit for foreclosure to pay the debt at any time, and have the property restored to his possession. This right does not depend upon the discretion of the court, but is one which he can claim, and the court cannot withhold it.[11] Payment destroys the plaintiff's cause of action; and though in general the receiver is appointed for the benefit of all parties interested, when upon pay-

[1] Porter *v.* Kingman (Mass. 1879), Boston Daily L. Reporter, Feb. 20, 1879.

[2] Hayes *v.* Dickinson, 9 Hun (N. Y.), 277; Post *v.* Dorr, 4 Edw. (N. Y.) Ch. 412.

[3] Lofsky *v.* Maujer, 3 Sandf. (N. Y.) Ch. 69.

[4] Howell *v.* Ripley, 10 Paige (N. Y.), 43; Post *v.* Dorr, 4 Edw. (N. Y.) 412.

[5] Noyes *v.* Rich, 52 Me. 115.

[6] Henshaw *v.* Wells, 9 Humph. (Tenn.) 568.

[7] Astor *v.* Turner, 2 Barb. (N. Y.) 444.

[8] Reid *v.* Middleton, 1 Turn. & R. 445; Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.), 565; Parker *v.* Browning, 8 Paige (N. Y.), 388, 390; Bowery Sav. Bk. *v.* Richards, 3 Hun (N. Y.), 366.

[9] Henshaw *v.* Wells, *supra.*

[10] Parker *v.* Browning, 8 Paige (N. Y.), 388.

[11] Milwaukee & Minn. R. R. Co. *v.* Soutter, 2 Wall. 510; Woolworth C. C. 49.

ment, the plaintiff's right of action is ended, the rights of the other parties fall with it.[1] But while the plaintiff's action is pending, a receiver appointed at his instance will not generally be discharged on his application without the concurrence of all others interested in the property.[2]

[1] Davis *v.* Duke of Marlborough, Swans. 168; Paynter *v.* Carew, 18 Jur. 417.

[2] Bainbrigge *v.* Blair, 3 Beav. 421.

CHAPTER XXXIV.

DECREE OF STRICT FORECLOSURE.

I. Nature and use of this remedy, 1538–1541.
II. In what states it is used, 1542–1556.
III. Pleadings and practice, 1557–1568.
IV. Setting aside and opening the foreclosure, 1569, 1570.

1. *Nature and Use of this Remedy.*

1538. Historical. — In the progress of the doctrine of mortgages, the first advance was to relieve the mortgagor from the forfeiture of his estate through failure to perform the condition within the time limited by the deed. "At length," says Spence, "in the reign of Charles I., it was established that in all cases of mortgages, when the money was actually paid or tendered, though after the day, the mortgage should be considered as redeemed in equity as it would have been at law on payment before the day; and from that time bills began to be filed by mortgagees for the extinction or foreclosure of this equity, unless payment were made by a short day, to be named."[1] This was the form of foreclosure first adopted by courts of equity, and until quite recent times was the only form. Although this form of foreclosure has, through the action of the courts and by statutory enactments, gradually given way within the last hundred years to the more equitable mode of foreclosure by sale, it is still used by courts of equity as the mode best adapted to a few special cases, and in two of our states is the mode in general use.

This is the foreclosure spoken of in the books; but since foreclosure, in this country at least, has come to mean generally a foreclosure by sale, this form, by which the absolute ownership of the property is given to the mortgagee under a decree of court, has of late come to be designated for the purpose of distinguishing it a strict foreclosure.

1539. Nature of this remedy. — A strict foreclosure was the

[1] Spence Eq. Juris. 603.

natural remedy upon a mortgage, when it was regarded as a conditional sale of the land rather than as a mere security; for the mortgagor having failed to perform the condition, it was consistent with this doctrine of the condition that the courts should, after having relieved the mortgagor from the forfeiture of his condition, require him to perform it within a reasonable time or be forever barred of his right to redeem.[1] But when the mortgage came to be regarded as a new security for the payment of the debt, and the breach of the condition as of no effect beyond giving the mortgage creditor the right to resort to his security, the natural remedy for the breach was to sell the property secured and apply the proceeds to the payment of the debt; as in this way the debtor would have the benefit of the estate when this was of greater value than the debt, and the mortgagee would have a claim for the deficiency not paid by the proceeds of sale. The advantages of a sale of the property over a foreclosure were discussed in the earlier cases, before the practice of ordering a sale had become almost universal as it now is, except in special cases.[2]

1540. Foreclosure is proper in the case of a mortgage given for the entire purchase money, when the value of the premises is not more than the mortgage debt, and the mortgagor does not appear in the suit.[3] It is proper where a mortgagee is in possession under a title from the mortgagor, for the purpose of cutting off subsequent liens or incumbrances, as in case one has purchased in good faith at a mortgage sale, which is not conclusive against some incumbrancer not made a party to the suit, and the purchaser has gone into possession.[4] It is proper, too, where the mortgage is in the form of an absolute deed without any written defeasance.[5] In these cases the decree of strict foreclosure perfects and confirms the title.

1541. Land contract. — A judgment of strict foreclosure may properly be rendered upon a land contract for failure of the ven-

[1] Per Jones, Chancellor, in Lansing *v.* Goelet, 9 Cow. (N. Y.) 352.

[2] Per Jones, Chancellor, in Lansing *v.* Goelet, *supra*; per Kent, Chancellor, in Mills *v.* Dennis, 3 Johns. (N. Y.) Ch. 367; per Peckham, J., in Bolles *v.* Duff, 43 N. Y. 469; per Bland, Chancellor, in Williams's case, 3 Bland (Md.), 193; Wilder *v.* Haughey, 21 Minn. 101; Mussina *v.* Bartlett, 8 Port. (Ala.) 277.

[3] Wilson *v.* Geisler, 19 Ill. 49.

[4] Kendall *v.* Treadwell, 14 How. (N. Y.) Pr. 165; 5 Abb. Pr. 16; Benedict *v.* Gilman, 4 Paige (N. Y.), 58.

[5] Hone *v.* Fisher, 2 Barb. (N. Y.) Ch. 559.

dee to make the payments stipulated for.[1] As to the form of the decree, it should be that the money due on the contract be paid within such reasonable time as the court shall direct, and that in case of failure to make payment, the vendee be foreclosed of his equity of redemption.

A decree of sale would be improper, because the title to the premises does not pass by the contract, but remains in the vendor. The vendor is entitled to such decree, although he is unable to give a perfect title to the property, unless the purchaser offers to rescind. He need not first tender a deed. If the purchaser has not tendered the purchase money, and it appears that he would not have paid it if a tender of the deed had been made, such tender is rendered unnecessary.[2]

A mortgagee who has taken possession of premises mortgaged for his support, on account of a breach of the condition, and has for several years supported himself, may have a decree to quiet the title.[3]

2. *In what States it is used.*

1542. Alabama. — There may be a strict foreclosure where the parties have themselves agreed to this, or where it is for their interest;[4] and it is a proper remedy in case the mortgagee has obtained a release of the equity of redemption, which is worth nothing above the debt, in order to cut off intermediate incumbrancers and quiet the title.[5]

1543. California. — There may be a strict foreclosure when the circumstances of the case render this proper.[6]

1544. Connecticut. — A strict foreclosure is the usual form. As will be seen by reference to the statutes no other form is provided for.[7] When foreclosure is made by an executor, administrator, or trustee, the premises foreclosed, or the avails thereof, if sold by him, are held by him for the benefit of the same persons as the money secured by the mortgage would have been held if collected without foreclosure; and in case the premises are not

[1] §§ 225–235; Landon *v.* Burke, 36 Wis. 378; Button *v.* Schroyer, 5 Wis. 598; Baker *v.* Beach, 15 Wis. 99; Kimball *v.* Darling, 32 Wis. 675; Buswell *v.* Peterson, 41 Wis. 82.

[2] McIndoe *v.* Morman, 26 Wis. 588.

[3] Frizzle *v.* Dearth, 28 Vt. 787.

[4] Hunt *v.* Lewin, 4 St. & P. (Ala.) 138.

[5] Hitchcock *v.* U. S. Bank of Penn. 7 Ala. 386.

[6] Goodenow *v.* Ewer, 16 Cal. 461; McMillan *v.* Richards, 9 Cal. 365.

[7] See § 1326.

sold, they are distributed or disposed of to the same persons as would have been entitled to the money if collected.[1]

1545. Illinois. — It is only in rare cases, as where the property is of less value than the debt and the mortgagor is insolvent, and the mortgagee is willing to take the property and discharge the debt, that a strict foreclosure is allowed.[2] It is not proper where there are other incumbrances on the property, or creditors, or purchasers of the equity of redemption.[3]

When the mortgagor has deceased and his estate is insolvent, the case is assimilated to that where there are other incumbrances upon the property; and a sale should be directed instead of a strict foreclosure.[4]

1546. Iowa. — "What is known as a strict foreclosure has no place in our system of procedure."[5]

1547. Kentucky. — Strict foreclosures were formerly decreed; but now the Code provides that there shall be a sale in all cases.[6]

1548. Minnesota. — The court has power to decree a strict foreclosure,[7] and by a recent statute this power is expressly conferred in cases where such remedy is just and appropriate; but no final decree of foreclosure can be rendered until the lapse of one year after a judgment fixing the amount due.[8] The courts, however, regard a sale as the proper remedy in almost all cases.[9]

1549. Missouri. — Strict foreclosure is not allowed.[10]

1550. Nebraska. — Under the territorial statutes providing for foreclosure by a sale of the premises, it was held that the court had the same power as the English Chancery Court to decree a strict foreclosure.[11] But in a later case, and under different statutes, it was held that a strict foreclosure could not be had; that the remedy is confined to a sale of the premises.[12]

1551. New York. — A strict foreclosure is rarely pursued or allowed, except in cases where a foreclosure has once been had,

[1] Gen. Stat. 1875, p. 359.

[2] Sheldon *v.* Patterson, 55 Ill. 507; Horner *v.* Zimmerman, 45 Ill. 14; Stephens *v.* Bichnell, 27 Ill. 445; Wilson *v.* Geisler, 19 Ill. 49; Johnson *v.* Donnell, 15 Ill. 97.

[3] Farrell *v.* Parlier, 50 Ill. 274; Horner *v.* Zimmerman, 45 Ill. 14; Warner *v.* Helm, 6 Ill. 220.

[4] Boyer *v.* Boyer (Ill. 1879), 8 Cent. L. J. 217.

[5] Gamut *v.* Gregg, 37 Iowa, 573.

[6] Caufman *v.* Sayre, 2 B. Mon. 202; Code, 1867, § 404; Code, 1876, § 375.

[7] Heyward *v.* Judd, 4 Minn. 483.

[8] Laws, 1870, c. 58.

[9] Wilder *v.* Haughey, 21 Minn. 101.

[10] Davis *v.* Holmes, 55 Mo. 349.

[11] Wood *v.* Shields, 1 Neb. 453.

[12] Kyger *v.* Ryley, 2 Neb. 20.

and the premises sold without making a judgment creditor, or some person similarly situated, a party to the suit; in which case his right of redemption may properly be barred in this way.[1]

1552. North Carolina. — Foreclosure was formerly made without sale. In a case before the court in 1837,[2] Ruffin, C. J., said that "of late years a beneficial practice has gained favor, until it may be considered established in this country, not absolutely to foreclose in any case, but to sell the mortgaged premises and apply the proceeds in satisfaction of the debt; if the former exceed the latter, the excess is paid to the mortgagor; if it fall short, the creditor then proceeds at law on his bond or other legal security to recover the balance of the debt." It was then the practice to direct a sale upon the application of either party; but when no such application was made to decree a foreclosure.[3]

1553. Ohio. — The rule formerly was that the mortgagee was entitled to foreclosure instead of a sale when two thirds of the value of the mortgaged premises did not exceed the debt. Now a sale is provided for in all cases.[4]

1554. Tennessee. — The court as early as 1805 refused a prayer that the property might be vested in the complainant, but directed a sale, according to the provision of the statute relating to sales under execution.[5]

1555. Vermont. — By reference to the statutory provisions in respect to foreclosure, it will be seen that the form of foreclosure in equity is a decree of strict foreclosure; although there may be a foreclosure by action at law with a similar result.[6]

1556. Wisconsin. — There may be a decree of strict foreclosure when this remedy is proper.[7] Land contracts are foreclosed in this manner.[8] In the foreclosure of a mortgage conditioned to support the mortgagee and to pay his debts, the judgment should be in the nature of a strict foreclosure.[9]

[1] Bolles *v.* Duff, 43 N. Y. 469; 10 Abb. Pr. N. S. 399, 414; 41 How. Pr. 355; Blanco *v.* Foote, 32 Barb. (N. Y.) 535; Benedict *v.* Gilman, 4 Paige (N. Y.), 58; Kendall *v.* Treadwell, 5 Abb. (N. Y.) Pr. 16; 14 How. Pr. 165.

[2] Fleming *v.* Sitton, 1 Dev. & Bat. Eq. 621.

[3] Green *v.* Crockett, 2 Dev. & Bat. Eq. 390.

[4] Anon. 1 Ohio, 235; Higgins *v.* West, 5 Ohio, 554.

[5] Hord *v.* James, 1 Over. (Tenn.) 201.

[6] See § 1361; Paris *v.* Hulett, 26 Vt. 308.

[7] Sage *v.* McLaughlin, 34 Wis. 550; Bean *v.* Whitcomb, 13 Wis. 431.

[8] Landon *v.* Burke, 36 Wis. 378.

[9] Bresnahan *v.* Bresnahan (Wis. 1879), 1 Wis. Leg. N. 217.

3. *Pleadings and Practice.*

1557. Until the whole debt becomes due a conclusive foreclosure of the whole estate mortgaged will not be decreed. Sometimes the mortgage contains an express stipulation that the whole debt shall be due and payable upon default in the payment of any instalment of it or of the interest secured. Of course the whole debt in such case being demandable, a decree of irrevocable foreclosure as to the entire debt may be made.[1]

1558. The rule as to parties is in general the same as in an action for the ordinary decree of sale. All persons interested in the mortgage or in the property[2] should be made parties. If the rights of some have been already barred by a previous action of foreclosure, only those who still have claims against the property should be made parties.[3] The owner of the equity of redemption is a necessary party defendant, and the only one wholly indispensable. The decree operates directly upon the property, and its effect is to restore it, upon payment, to the mortgagor; or, upon failure of payment, to vest it in the mortgagee: unless, therefore, the mortgagor or his assignee be before the court, the decree is without efficacy.[4] If subsequent mortgagees and others interested in the property are not made parties they are not concluded by the proceedings. But while they are proper parties they are not necessary parties.[5] In Connecticut, where a strict foreclosure is the mode in use, it is held that the bill may be maintained without making any subsequent incumbrancers parties.[6] But the propriety of this practice has been called in question.[7] For if the mortgagor alone be made a party when there are others having rights in the equity of redemption, the foreclosure merely extinguishes his right of redemption; and he may, by acquiring the right of a subsequent incumbrancer, proceed to redeem, notwithstanding the foreclosure.[8]

1559. In a bill in equity for a strict foreclosure after the

[1] Stanhope *v.* Manners, 2 Eden, 197; Leveridge *v.* Forty, 1 Maule & S. 706; Caufman *v.* Sayre, 2 B. Mon. (Ky.) 202.

[2] Though the interest be only that of an attaching creditor. Lyon *v.* Sandford, 5 Conn. 544. See chapter xxxi.

[3] Benedict *v.* Gilman, 4 Paige (N. Y.), 58.

[4] Goodenow *v.* Ewer, 16 Cal. 461.

[5] Brooks *v.* Vt. Cent. R. R. Co. 14. Blatchf. 463, 472; Weed *v.* Beebe, 21 Vt. 495.

[6] Smith *v.* Chapman, 4 Conn. 346.

[7] Goodman *v.* White, 26 Conn. 320.

[8] Goodman *v.* White, *supra.*

death of the mortgagee, his heirs at law are necessary parties. The decree in such case vests the legal title to the premises in the heir and not in the executor.[1] This is the rule in England, where formerly foreclosure was generally without sale.[2] When the bill is for a sale, and not for foreclosure, the heir of the mortgagee need not be joined. The personal representative alone may bring it.[3]

1560. **The pleadings and practice** are substantially the same as in the ordinary action; though the plaintiff sometimes offers in his complaint to take the mortgaged premises in full payment and satisfaction of his debt.[4] It is not infrequently a matter of agreement between the parties before the suit is commenced, that by this summary process the mortgagee shall be adjudged the absolute owner of the property, and that the mortgagor shall thereupon be freed from his debt; and in such case the bill should be drawn with reference to such agreement or understanding. In other cases in which there is no such agreement, but where the property is about equal in value to the debt, and it is the interest of the mortgagee to have a speedy foreclosure in this manner, his offer to take the property in satisfaction of the debt would generally be essential in preventing opposition to this form of foreclosure, and should therefore be set forth in the bill.

This specific remedy should be prayed for in the bill; though if in the progress of the cause the facts show that a strict foreclosure is the proper remedy, and subject to no objection, a decree might be entered in this form upon a bill drawn originally

[1] Osborne *v.* Tunis, 25 N. J. L. (Dutch.) 633. "True," says the Chief Justice, "while the mortgage retains its character of a pledge, of a mere security for the debt, it may be assigned by the executor. It will pass by an assignment of the bond as a mere incident of the mortgage debt. It is regarded as a chattel interest. But when the right to redeem is foreclosed, its character as a pledge ceases, and the title to the land mortgaged vests absolutely, by force of the conveyance, in the mortgagee, while living, or in his heir at law, if he be dead. The title relates no longer to the money, but to the land. Equity will permit the executor to follow the land into the hands of the heir, so far at least as to satisfy the mortgage debt, but the foreclosure fixes the title in the heir. And the reason assigned in the books why the heir of the mortgagee should be made a party to a bill filed by the executor to redeem or be foreclosed is, that otherwise, if the mortgagor should redeem, there would be no one before the court from whom a conveyance of the legal estate can be taken."

[2] 1 Fisher's Mortg. § 1061.

[3] See chapter xxxi.

[4] For a form of complaint proper in this action, see Kendall *v.* Treadwell, 5 Abb. (N. Y.) Pr. 16; 14 How. Pr. 165.

for a foreclosure sale; and although a strict foreclosure be prayed for the court may decree a sale.[1]

1561. The judgment in a strict foreclosure bars the defendants of all right and title and equity of redemption, unless they redeem or pay the mortgage within a day certain therein fixed, and usually six months from the date of the judgment.[2] It is therefore interlocutory, and makes provision applicable in case of a failure to redeem. When a day is appointed upon which redemption is to be made, the plaintiff should attend at the time and place fixed to receive the amount and release the property.

1562. Delivery of possession.[3] — Upon failure of the defendant to pay the amount due within the time stipulated, it seems that application should be made to the court, founded upon proof of a demand and refusal to pay the amount adjudged to be paid, for the issuing of a process in the nature of a writ of assistance, to put the plaintiff into possession.[4]

Under the English practice, however, upon a decree of strict foreclosure the court does not order a delivery of possession of the premises to the complainant, but leaves him to his legal remedy by ejectment.[5] The complainant has the legal title, and the court only declares that the equity of redemption is foreclosed. The delivery of possession is not necessary to give effect to the decree of court, as it is in case of a sale. If the mortgagee be in possession, the decree may properly direct him to vacate and release the premises on payment to him of the sum found due.[6]

1563. On a strict foreclosure the time allowed for redemption before the foreclosure becomes absolute is within the discretion of the court. Six months was the usual time formerly allowed; but the time is a matter within the discretion of the court, having in view the circumstances of the case.[7]

[1] Sage *v.* McLaughlin, 34 Wis. 550.

[2] Farrell *v.* Parlier, 50 Ill. 274. For a form of judgment where there were conflicting equities, see Kendall *v.* Treadwell, 14 How. (N. Y.) Pr. 165; 5 Abb. Pr. 16. For decree against two defendants, of whom one stands in relation of surety to the other, see Waters *v.* Hubbard, 44 Conn. 340. See Sage *v.* Cent. R. R. Co. of Iowa, 13 West. Jur. 218. Whether a second decree after a decree *nisi* is necessary, see Mulvey *v.* Gibbons, 87 Ill. 367.

[3] In **Connecticut** provision is made by statute for delivery of possession. See **§ 1326.**

[4] Landon *v.* Burke, 36 Wis. 378; Buswell *v.* Peterson, 41 Wis. 82.

[5] Sutton *v.* Stone, 2 Atk. 101; Seaton's Decrees, 140.

[6] Kendall *v.* Treadwell, 5 Abb. (N. Y.) Pr. 16; 14 How. Pr. 165.

[7] McKinstry *v.* Mervin, 3 Johns. (N. Y.) Ch. 466, note; Perine *v.* Dunn, 4 Ib. 140;

In Vermont the time is by statute made one year;[1] and under the chancery practice it was before the statute a year and a week.[2] The time may be enlarged and usually is on application, but a satisfactory reason for it must be shown.[3]

When a sale is decreed instead of a foreclosure, it is not the practice ordinarily to fix a day for payment in failure of which the sale shall take place,[4] though this course has sometimes been taken. The reason for enlarging the time of redeeming does not apply in case a sale is ordered according to the usual practice; for the mortgagor in the case of a sale is supposed to receive the full value of the property by the payment of the debt and receipt of the surplus, and, therefore, applications for the postponement of sales are not ordinarily allowed.

1564. When a strict foreclosure is had against an infant heir of the mortgagor, he is usually entitled to a day in court after he comes of age. The former practice was to allow him six months after coming of age, not to go into the accounts or to redeem, but to show error in the decree. A decree of sale, however, is binding upon the infant.[5]

1565. As already noticed a time for redemption is always allowed in a decree for a strict foreclosure. A decree which does not find the amount due, which also allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, unless authorized by statute, cannot be sustained. Although the usual time of redemption allowed is six months, yet it is really within the discretion of the court as to the length of it; but the discretion does not extend to withholding it entirely.[6]

1566. A foreclosure in equity may result from the dismissal of a bill to redeem. In New York it is held that after the mortgagor's failure to pay within the time limited, a final order that the bill be dismissed should be obtained, and that until this is

Harkins *v.* Forsyth, 11 Leigh (Va.), 294; Barnes *v.* Lee, 1 Bibb (Ky.), 526.

[1] See § 1361.

[2] Langdon *v.* Stiles, 2 Aik. (Vt.) 184.

[3] Monkhouse *v.* Corporation of Bedford, 17 Ves. 380; Renvoize *v.* Cooper, 1 Sim. & Stu. 365; Quarles *v.* Knight, 8 Price, 630; Downing *v.* Palmateer, 1 Mon. (Ky.) 66.

[4] Mussina *v.* Bartlett, 8 Port. (Ala.) 288.

[5] Mills *v.* Dennis, 3 Johns. (N. Y.) Ch. 367.

[6] Clark *v.* Reyburn, 8 Wall. 318; Johnson *v.* Donnell, 15 Ill. 97; Blanco *v.* Foote, 32 Barb. (N. Y.) 535.

done no title passes to the mortgagee.[1] In Massachusetts it is held that even without a formal order of dismissal, a mortgage is foreclosed upon the mortgagee's obtaining a judgment for costs after the mortgagor has failed to pay the amount found due in his suit for redemption within the time ordered. The judgment for costs substantially terminates the suit upon its merits.[2]

1567. The effect of a strict foreclosure is not to extinguish the debt, unless the premises are of sufficient value to pay it. When this is sufficient the debt is satisfied. The value of the property may be ascertained in a suit at law upon the mortgage debt to recover the difference.[3] Sometimes, by agreement of the parties or by the offer of the plaintiff, the decree transferring the absolute title to him is expressly taken in full satisfaction of the debt, and the decree should then so provide.[4] A debt not included in the decree is not satisfied by the foreclosure; and it may be shown by parol whether a particular debt was included in the decree.[5] But the decree does not operate to satisfy the debt, or any part of it, until it has become absolute by the expiration of the time limited in it within which the mortgagor may pay the debt and redeem the estate.[6]

There is no judgment for a deficiency in this form of foreclosure.[7] The statutes providing for such a judgment relate wholly to foreclosures by sale. Very frequently the plaintiff releases the mortgagor from personal liability. He can enforce it only by suit at law.

1568. Costs. — Ordinarily costs will be allowed as upon a decree for sale. If, however, as is common where this form of foreclosure is used only in special cases, and the mortgagee has pro-

[1] See § **1108**; Wood *v.* Surr, 19 Beav. 551; Hansard *v.* Hardy, 18 Ves. 460; Bolles *v.* Duff, 43 N. Y. 469; Beach *v.* Cooke, 28 N. Y. 535; Perine *v.* Dunn, 4 Johns. (N. Y.) Ch. 140.

[2] Stevens *v.* Miner, 110 Mass. 57.

[3] See § **950**; Edgerton *v.* Young, 43 Ill. 470; Vansant *v.* Allman, 23 Ill. 30; Spencer *v.* Harford, 4 Wend. (N. Y.) 381; Morgan *v.* Plumb, 9 Wend. (N. Y.) 287; De Grant *v.* Grahan, 1 N. Y. Leg. Obs. 75; Bassett *v.* Mason, 18 Conn. 136; New Haven Pipe Co. *v.* Work, 44 Conn. 230. In Connecticut prior to 1833, the foreclosure extinguished the debt, whatever may have been the value of the property. Derby Bank *v.* Landon, 3 Conn. 63; Swift *v.* Edson, 5 Conn. 154; McEwen *v.* Welles, 1 Root (Conn.), 203; Fitch *v.* Coit, 1 Root (Conn.), 266. In Vermont the decree, whether upon a bill in chancery or in an action of ejectment, after the expiration of the time of redemption, operates as satisfaction in whole or *pro tanto* as the case may be. Paris *v.* Hulett, 26 Vt. 308.

[4] 5 Wait's Prac. 248, 249.

[5] Goddard *v.* Selden, 7 Conn. 520.

[6] Peck's Appeal, 31 Conn. 216.

[7] Bean *v.* Whitcomb, 13 Wis. 431.

posed to take the property and discharge the debt, no costs are allowed. In all cases the court has discretionary power in this matter. When a purchaser at a foreclosure sale brings a bill for a strict foreclosure against a prior judgment creditor who was not a party to the former foreclosure suit, if he wishes to redeem he must pay the costs of suit, but not the costs of the suit on which the sale was made.[1]

4. *Setting aside and opening the Foreclosure.*

1569. A strict foreclosure may be set aside for many of the same causes for which a foreclosure sale is set aside.[2] As the effect of the decree is to vest an absolute title in the holder of the mortgage, so long as he retains the title he stands very much in the same relation to the property and to the mortgagor as does a mortgagee who has bought the property at a foreclosure sale, and against whom the court would more readily set aside the foreclosure sale than against a stranger who had in good faith made the purchase.[3] After the foreclosure the relations of the parties are also very much the same as they would be if the mortgage had been foreclosed by entry and possession in the manner in use in Massachusetts; and the foreclosure will be waived or opened by the subsequent dealings of the parties between themselves in the same manner:[4] as, for instance, by the payment of part of the amount due;[5] by their treating the debt as still due;[6] or by their agreeing in any way that the foreclosure shall have no effect.[7]

The opening of a decree of foreclosure does not depend upon the inquiry whether the proceedings in the case were regular, but may depend wholly upon equitable considerations in any way affecting the rights of parties.[8] Where the failure of the mortgagor to pay according to the decree was not through his own negligence, but in consequence of propositions for settlement and payment which were to be carried into effect after the time of payment had expired, and the failure to perform this was on the

[1] Benedict *v.* Gilman, 4 Paige (N. Y.), 58; Vroom *v.* Ditmas, 4 Paige (N. Y.), 526.

[2] See §§ **1668–1681.**

[3] See § **1671.**

[4] See §§ **1265–1275.**

[5] Converse *v.* Cook, 8 Vt. 164; Smalley *v.* Hickok, 12 Vt. 153.

[6] Bissell *v.* Bozman, 2 Dev. Eq. (N. C.) 154.

[7] Griswold *v.* Mather, 5 Conn. 435.

[8] Bridgeport Savings Bank *v.* Eldredge, 28 Conn. 556.

part of the mortgagee, the decree of foreclosure was opened.[1] The mortgagee's promise to give the mortgagor further time for redemption after the expiration of the decree does not entitle the mortgagor to claim that the decree be opened, if he has made no offer to perform his part of the agreement.[2] A promise by the holder of a mortgage or decree of foreclosure to allow a redemption after the expiration of the decree is equally binding upon one who purchases the decree with knowledge of such promise.[3] A decree was opened after the expiration of the time limited for redemption, for the reason that the mortgagor, having paid part of the debt, fell sick on a journey undertaken for the purpose of obtaining the balance of the money, and was unable to get back until ten days after the time limited, when he tendered the amount.[4] It was opened, also, in a case where the mortgagor supposed he had made a valid tender within the time limited, though by informality it was not good.[5]

If the mortgagor against whom a decree of foreclosure has been entered limiting the time of redemption to a particular day is prevented from paying the debt and redeeming, by the happening of an unforeseen event over which he had no control, a court of equity will open the foreclosure. This was done in a case where the foreclosure was to become absolute on the fifth day of August. The property was worth more than eight thousand dollars, and was nearly all the mortgagor had, and the debt was less than four thousand dollars. The mortgagor had relied upon receiving the money from an uncle who had ample means, and had promised to furnish it on the third day of August, but unexpectedly failed to do so. On the evening of the fifth day of August the mortgagor procured a person who had the necessary amount in United States bonds, but not in money, to go to the mortgagee's house that evening. This person finding that the mortgagee had gone to bed, sent him word by his wife that he had come to redeem the mortgaged property; to which the mortgagee replied that he was sick — and so nothing further was done. The mortgagor was allowed to redeem.[6]

[1] Pierson *v.* Clayes, 15 Vt. 93.
[2] Blodgett *v.* Hobart, 18 Vt. 414.
[3] Woodward *v.* Cowdery, 41 Vt. 496.
[4] Doty *v.* Whittlesey, 1 Root (Conn.), 310.
[5] Crane *v.* Hanks, 1 Root (Conn.), 468.
[6] Bostwick *v.* Stiles, 35 Conn. 195.

If the mortgagee, after a decree of foreclosure and before the expiration of the time limited for redemption, says to the mortgagor that he may pay the debt after the time limited, and that no advantage should be taken of the decree, and the mortgagor in consequence allows the time to expire without paying the debt, the foreclosure will be opened. The mortgagor is also entitled to equitable relief if the decree has been obtained by fraud, or if after it is obtained he is deceived in relation to the time limited for redemption, and he consequently fails to redeem;[1] or if no service of the summons was made upon him, and he had no actual knowledge of the pendency of the suit until after the time of redemption had expired, though the decree found that service had been made.[2]

Where the parties to a foreclosure suit agreed upon a time for redemption to be limited by the decree, but by mistake the time was not inserted in the decree, the mortgagor at the end of three years after the time so limited by agreement was not allowed to open the foreclosure and redeem. The mortgagor could equitably ask for nothing more than the correction of the mistake, and this would avail him nothing.[3] This relief may be had on an ordinary bill to redeem, taking no notice of the decree of foreclosure.[4]

1570. In any case where proper service has not been made on a defendant, the foreclosure will be opened or he will be allowed on application to have the judgment set aside and to appear in the suit.[5] In his application for such relief he must tender payment of the mortgage debt or show his readiness to do so.[6] Where notice of a bill for foreclosure was ordered by the court to be given by mailing an attested copy of the bill to the parties interested in the property, and a subsequent mortgagee did not receive the notice, and had no knowledge of the suit until after a decree had been passed and the time limited for redemption had expired, the foreclosure was opened and further time for redemption allowed.[7]

[1] Weiss *v.* Alling, 34 Conn. 60.

[2] Bridgeport Sav. Bk. *v.* Eldredge, 28 Conn. 561.

[3] Colwell *v.* Warner, 36 Conn. 224.

[4] Bridgeport Savings Bank *v.* Eldredge, 28 Conn. 556.

[5] Fall *v.* Evans, 20 Ind. 210; Mitchell *v.* Gray, 18 Ind. 123.

[6] Hatch *v.* Garza, 7 Texas, 60.

[7] Bank of North America *v.* Norwich Savings Society, 37 Conn. 444.

CHAPTER XXXV.

DECREE OF SALE.

I. A substitute for foreclosure, 1571–1573.
II. The form and requisites of the decree, 1574–1586.
III. The conclusiveness of the decree, 1587–1589.
IV. The amount of the decree, 1590–1601.
V. Costs, 1602–1607.

1. *A Substitute for Foreclosure.*

1571. Generally. — As already noticed, the earliest remedy sought in chancery in the foreclosure of mortgages was a decree wholly cutting off the debtor's right to redeem, and vesting the estate absolutely in the mortgagee. This procedure, when the property exceeded in value the debt, sometimes operated harshly upon the debtor. It operated unjustly to the creditor as well when the property was insufficient to pay the debt, because no convenient remedy was afforded him to collect the deficiency. A more equitable system was early adopted by the courts in this country, under which the property was sold for the benefit of the parties interested, and the proceeds applied first to the payment of the mortgage debt, and the surplus, if any, paid to the debtor or his assigns. If a balance of the debt remained unpaid after applying the proceeds of the property, an action at law might be had against the debtor to recover.

Now, in many states under the new codes of civil practice the formal distinction between suits in equity and suits at law has been done away with, and though foreclosure remains of course an equitable procedure, provision is made for a decree or judgment in this proceeding, not only for a sale of the property, but also for a recovery of any balance of the debt remaining after the sale, thus avoiding the necessity of a separate action at law.

1572. In England the usual practice formerly was to decree a strict foreclosure, though the Court of Chancery had the power

without the aid of any statute to order a sale of the property.[1] Now it is provided by the Chancery Improvement Act,[2] that upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or of any person claiming under them respectively, the court may, instead of a foreclosure, direct a sale of the property upon such terms as it may deem proper. The consent of the mortgagee or those claiming under him is requisite to a sale, when the request for it is made by any other person, unless the party making the request deposits a reasonable sum of money for the purpose of securing the performance of such terms as the court may impose upon him.[3] Under this statute the parties have no absolute right to require a sale, but the court has power in its discretion to grant it; and this is now the usual course. A sale may be directed against the wish of the mortgagor.[4] Where the security has been scanty, it has always been deemed proper to direct a sale;[5] as also when the property was unproductive.[6]

An equitable mortgagee by deposit of title deeds is entitled to a decree of foreclosure instead of sale.[7] The usual practice in granting a sale of the property was to give a limited time, varying from one month,[8] to six months,[9] within which the mortgagor might redeem before the sale. Sometimes, however, an immediate sale was ordered, as where the property was unproductive,[10] or where for any reason this seemed to be for the benefit of all the parties.[11]

It was also the practice, in case the equity of redemption belonged to an infant heir or devisee, to direct a sale with the consent of the mortgagee, because a sale would bind the infant, but he would be entitled to a day after coming of age to show cause against a decree of foreclosure.[12]

But in this country a sale, with rare exception, being made

[1] 2 Story's Eq. §§ 1024–1026. In Ireland the decree is always for a sale. Hutton *v.* Mayne, 3 Jo. & Lat. 586.

[2] 15 & 16 Vict. c. 86, § 48.

[3] The deposit must be sufficient to cover an unsuccessful attempt to sell. Bellamy *v.* Cockle, 18 Jur. 465.

[4] Newman *v.* Selfe, 33 Beav. 522; and see Woodford *v.* Brooking, Law Rep. 17 Eq. 425.

[5] Dashwood *v.* Bithazey, Mos. 196.

[6] How *v.* Vigures, 1 Ch. R. 18.

[7] James *v.* James, Law Rep. 16 Eq. 153.

[8] Smith *v.* Robinson, 1 Sm. & Giff. 140; Staines *v.* Rudlin, 16 Jur. 965.

[9] Bellamy *v.* Cockle, 18 Jur. 465; Daniell Ch. p. 1152.

[10] Foster *v.* Harvey, 11 Weekly R. 899.

[11] Hewitt *v.* Nanson, 28 L. J. (Ch.) 49.

[12] Fisher's Mortg. pp. 526, 1018; Scholefield *v.* Heafield, 7 Sim. 667; Davis *v.* Dowding, 2 Keen, 245; Booth *v.* Rich, 1 Vern. 295.

in all cases, the only inquiry where infants are concerned is, whether a sale of the whole or of a part of the premises will be most for the infant's benefit, and a reference should be made to ascertain this fact, and what part shall be sold if less than the whole.[1]

1573. Independently of all statutory provisions, a court of equity has jurisdiction to order a sale and provide for carrying it out,[2] although in most of the states where foreclosure is effected by a judicial sale there are statutes providing for this, and regulating it.

No sale can be made without a decree of court for that purpose first obtained.[3] Although the practice of foreclosure and sale of the mortgaged property in equity is traced to the civil law,[4] where the remedy was generally by a proceeding *in rem* for a sale of the property, yet under that law it was not indispensable that the mortgagee should obtain a judicial decree for such sale; the mortgagee might also by his own act, after giving a certain prescribed notice to the debtor, sell the property and reimburse himself from the proceeds of the sale.[5] If the debtor could not be found so as to serve the notice upon him, an order of court was necessary. This right to sell was not confined to cases where the parties had expressly provided for it, but might be exercised as well when the mortgage itself was silent upon the matter.[6] But under the common law practice, the mortgagee is never allowed to sell by his own voluntary act without a judicial decree, except when a power of sale is expressly given him, and even when having such special authority in some states by statute, a decree for the sale must first be obtained, and the sale thus becomes a judicial sale rather than a sale under the power.

[1] Mills *v.* Dennis, 3 Johns. (N. Y.) Ch. 367.

[2] Lansing *v.* Goelet, 9 Cow. 352, where Chancellor Jones in an elaborate opinion justifies the practice of courts of equity in ordering sales; Mills *v.* Dennis, 3 Johns. Ch. 367; Williams's case, 3 Bland (Md.), 193; Belloc *v.* Rogers, 9 Cal. 123; Green *v.* Crockett, 2 Dev. & B. Eq. 393.

The earliest statute in New York recognizing a foreclosure sale is that of April 3, 1801. Laws of N. Y. (Webster & Skinner's ed.) 443; though it is said that the practice of selling the mortgaged property prevailed under the colonial government.

[3] Hart *v.* Ten Eyck, 2 Johns. (N. Y.) Ch. 100. "There was never an instance," says Chancellor Kent, "where a creditor holding land in pledge was allowed to sell at his own will and pleasure."

[4] Story's Eq. Juris. §§ 1008, 1011.

[5] Story's Eq. Juris. §§ 1008, 1024.

[6] Story's Eq. Juris. § 1008. "Even an agreement between them, that there should be no sale was so far invalid, that a decretal order of sale might be obtained upon the application of the creditor."

2. *The Form and Requisites of the Decree.*

1574. In general. — The decree for the sale of the premises should contain a description of the property to be sold, a statement of the amount of the debt, a direction that the premises, or so much of them as may be necessary, shall be sold by an officer designated, who shall execute a deed to the purchaser, and that out of the proceeds of the sale he pay to the plaintiff the amount of his debt, interest, and costs, together with the expenses of the sale. It is usual to provide that the plaintiff may purchase at the sale; and that the purchaser shall be let into possession on the production of the deed. If a personal judgment is asked for and is proper, the defendants, who are personally liable for the debt, must be designated.[1]

If redemption is allowed after sale, this right should be provided for in the decree, although it will not be considered as denied if not provided for.[2]

1575. The decree and order of sale may properly follow the terms of the mortgage, when this upon its face appears to convey the entire estate, and the officer must sell accordingly; but the purchaser will take only the interest the mortgagor had in the premises, and it is no ground for reversal that the mortgagor had only an equitable interest.[3] If the mortgagor had no title to a portion of the premises embraced in the mortgage, this portion may properly be omitted from the order of sale.[4] When the terms of the mortgage are followed in the direction of sale, and the sheriff or referee sells a less estate than that expressed in the mortgage, as, for instance, a leasehold estate when the mortgage erroneously described an estate in fee, the sale transfers all the title the mortgagor had in the premises, and it does not lie with the mortgagor, nor with a purchaser who has full knowledge of the facts, to object.[5]

It is usual to embody in the order of sale a full description of the property to be sold, with the particular boundaries of it, so far at least as they can be ascertained from the mortgage. But this is not essential. The decree of sale, instead of describing the

[1] Leviston *v.* Swan, 33 Cal. 480; 5 Wait's Prac. 218.

[2] Boester *v.* Byrne, 72 Ill. 466.

[3] Jones *v.* Lapham, 15 Kans. 540.

[4] Castro *v.* Illies, 22 Tex. 479.

[5] Graham *v.* Bleakie, 2 Daly (N. Y.), 55.

mortgaged property at length, may direct a sale of the premises as described in the complainant's bill; and if the premises are properly described in the bill or in the mortgage, and this is made part of the bill as an exhibit, no formal description is necessary in the decree.[1] If the original mortgage contains in the description of the premises a latent ambiguity which renders it uncertain what are the boundaries, the court may by its judgment fix the boundaries of the land with reference to the foreclosure sale.[2]

1576. Order of sale. — If portions of the premises have been sold subsequent to the mortgage, the decree should provide that the portion still owned by the mortgagor, or the person equitably bound to pay the debt, shall be first sold, and then the portions previously alienated in the inverse order of their alienation.[3] If a party to the suit desires to have the premises sold in a particular order, he should see that the decree so provides; or after the entry of the decree he may move for an order to the referee directing the manner in which the premises are to be sold.[4] In order to ascertain the respective equities of different owners the court may order a reference.[5] If the owner of the land makes no request as to the order in which several tracts of land included in the mortgage shall be sold, he cannot upon appeal object to a decree of court definitely fixing the order of sale.[6]

1577. Where only part of the debt or an instalment of interest is due, and the premises can be sold in parcels, the decree should be for the absolute sale of so much as will raise the amount actually due.[7] If the premises cannot be sold in parcels, the judgment should direct the sale of the whole, and the payment to the plaintiff of the amount actually due, and that the surplus be brought into court to await further order.[8] In such case it should appear of record that the court had first inquired whether the land

[1] Logan *v.* Williams, 76 Ill. 175.

[2] Doe *v.* Vallejo, 29 Cal. 385.

[3] N. Y. Life Ins. & Trust Co. *v.* Milnor, 1 Barb. (N. Y.) Ch. 353; Knickerbacker *v.* Eggleston, 3 How. (N. Y.) Pr. 130; Rathbone *v.* Clark, 9 Paige (N. Y.), 648; Worth *v.* Hill, 14 Wis. 559; Wisconsin *v.* Titus, 17 Wis. 241; Ogden *v.* Glidden, 9 Wis. 46; Warren *v.* Foreman, 19 Wis. 35; Cheever *v.* Fair, 5 Cal. 337.

[4] Vandercook *v.* Cohoes Sav. Inst. 5 Hun (N. Y.), 641.

[5] Bard *v.* Steele, 3 How. (N. Y.) Pr. 110; N. Y. Life Ins. & Trust Co. *v.* Cutler, 3 Sandf. (N. Y.) Ch. 176.

[6] Price *v.* Lauve, 49 Tex. 74.

[7] James *v.* Fisk, 17 Miss. 144; Roe *v.* Nicholson, 13 Wis. 373; Hunt *v.* Dohrs, 39 Cal. 304; Harris *v.* Makepeace, 13 Ind. 560; Denny *v.* Graeter, 20 Ind. 20; Beauchamp *v.* Leagan, 14 Ind. 401. See §§ **1478, 1700.**

[8] Walker *v.* Jarvis, 16 Wis. 28.

could be sold in parcels.[1] A decree directing a sale "according to law" has been held sufficient, although a statute required the court to direct a sale of the premises, "or so much thereof as is necessary."[2] When part of the mortgaged property has been sold for the payment of one instalment, a further decree of sale may be had for an instalment subsequently falling due.[3] Although the suit was commenced when only a part of the debt or one instalment of it was due, if the whole debt becomes due before the decree is entered, this should be in the ordinary form for a sale of the property to satisfy the whole debt.[4]

Where a decree directs a sale subject to the mortgage for the part of the debt not due, and the officer announces that the sale will be made in this manner, his failure to state this fact in his certificate of purchase and in his report of the sale, and the omission of this fact in the confirmation of the sale, do not affect or modify the original decree or release the lien reserved for the unforeclosed part of the debt. Under a decree for a sale subject to a lien specified, parol testimony is admissible to show that the property was offered for sale subject to such lien.[5]

A foreclosure for an instalment due before the principal amount, and a sale of the entire property, pass the interest of both mortgagor and mortgagee in the property, and a clear title to the purchaser.[6] The court may order payment of the instalment due; but if the property be indivisible so that a larger amount is received than is needed for that purpose, the court may retain custody of the surplus and jurisdiction of the case until the whole debt falls due.[7]

The power to foreclose and sell for the principal sum secured by a mortgage, on account of the non-payment of an instalment due, or of interest accrued, or taxes, exists when it is stipulated in the mortgage that in case of such non-payment the mortgagee may sell the premises and pay the debt from the proceeds.[8]

[1] Cubberly *v.* Wine, 13 Ind. 353; Wainscott *v.* Silvers, Ib. 497; Stewart *v.* Nettleton, 13 Wis. 465.

[2] Treiber *v.* Shaffer, 18 Iowa, 29, and see Kirby *v.* Childs, 10 Kans. 639.

[3] McDougal *v.* Downey, 45 Cal. 165.

[4] Smalley *v.* Martin, 1 Clarke (N. Y.), 293; Manning *v.* McClurg, 14 Wis. 350.

[5] McCart *v.* Frisby, 81 Ill. 188.

[6] Poweshiek Co. *v.* Dennison, 36 Iowa, 244; Grattan *v.* Wiggins, 23 Cal. 16.

[7] McDowell *v.* Lloyd, 22 Iowa, 448; Clark *v.* Abbott, 1 Madd. Ch. 474; Mussina *v.* Bartlett, 8 Port. (Ala.) 284; Smalley *v.* Martin, 1 Clarke (N. Y.), 293; Adams *v.* Essex, 1 Bibb (Ky.), 149.

[8] Pope *v.* Durant, 26 Iowa, 233; Kramer *v.* Rebman, 9 Iowa, 114.

1578. The decree should not attempt to give any relief not sought for in the pleadings;[1] if it does it will be vacated on motion.[2] But sometimes under the general prayer for relief, the court may grant relief not specifically asked for. Thus, where a railroad mortgage contained a provision that in case of a foreclosure sale the holders of a majority of the bonds secured by the mortgage should in writing request the trustee to purchase the premises for the use and benefit of the bondholders, he should be authorized to do so, and the deed of trust was made a part of the bill, it was held to be proper to grant the relief specifically which the provisions of the deed of trust contemplated.[3]

1579. It should not attempt to interfere with the rights of any who are interested in the property, but are not made parties to the suit; and it is ineffectual so far as it does this.[4] It should protect the rights of a defendant whose title to a part of the premises is paramount, although he could not be dispossessed of such part under the decree even if no reservation is made in respect to it.[5] Only the rights and interests possessed by the mortgagor at the date of the mortgage can be sold. A judgment which forecloses a prior mortgage is irregular and may be opened on motion of the prior mortgagee.[6] The rights of subsequent mortgagees who are made parties to the suit are generally sufficiently protected by the general direction in the decree for the payment of the surplus money into court, and by the subsequent proceedings for its distribution; though the practice in some courts has been to determine the rights of junior mortgagees in the first place, and direct the payment of the surplus towards the satisfaction of them.[7]

But the rights of subsequent incumbrancers may be protected by the court in the sale of the property where a portion of it is sufficient to satisfy the mortgage, by ordering the sale of enough so that the other incumbrancers may be paid.[8] And where after

[1] Knowles *v.* Rablin, 20 Iowa, 101.

[2] Simonson *v.* Blake, 12 Abb. (N. Y.) Pr. 331; 20 How. Pr. 484.

[3] Sage *v.* Cent. R. R. Co. of Iowa (U. S. Supreme Ct.), 13 West. Jur. 218.

[4] Watson *v.* Spence, 20 Wend. (N. Y.) 260; Montgomery *v.* Tutt, 11 Cal. 307; and see Totten *v.* Stuyvesant, 3 Edw. (N. Y.) 500.

[5] Wicke *v.* Lake, 21 Wis. 410; San Francisco *v.* Lawton, 21 Cal. 589; Elias *v.* Verdugo, 27 Cal. 418.

[6] McReynolds *v.* Munns, 2 Keyes, 214.

[7] Union Water Co. *v.* Murphy's Flat Fluming Co. 22 Cal. 620.

[8] Livingston *v.* Mildrum, 19 N. Y. 440.

the decease of the mortgagor it appeared to be for the benefit of his children that the entire mortgaged premises should be sold, though the mortgage might have been satisfied by a sale of a part, the court ordered the sale of the whole.[1]

1580. When a junior mortgagee forecloses his mortgage by bill in equity, in case the prior mortgage is not yet due, he may have a decree for a sale of the equity of redemption subject to the prior mortgage, leaving the purchaser to pay that when it becomes due. If the prior mortgage be due, the junior mortgagee may redeem and sell the whole estate to obtain the redemption money as well as his own claim.[2] It has been held in a few cases that without redeeming he may make the prior mortgagee a party to the bill, and ask for a sale of the whole estate, and the payment of all incumbrances out of the proceeds;[3] but this is not the law now. Though the prior mortgagee be made a party and is defaulted, the decree only bars the equity of redemption of the complainant's mortgage, without affecting in any way that which is superior to it.[4] A junior mortgagee is entitled to proceed with his bill to foreclose, although the senior mortgagee has obtained a judgment of foreclosure, and the junior mortgagee may seek his remedy against the surplus moneys on the first mortgage.[5] He is entitled to have the issues raised in his action tried when it is reached.

1581. After-acquired title. — Ordinarily the title ordered to be sold is only that which the mortgagor held at the date of the mortgage. If in any case there are facts of an equitable character, such that a title acquired afterwards by the mortgagor or his vendee should be subjected to the lien of the mortgage, these should be set out in the complaint, and such after-acquired title should be included in the decree of sale, otherwise this will not include or affect the after-acquired title.[6] It must be first subjected to the lien of the mortgage by the foreclosure decree, which

[1] Brevoort *v.* Jackson, 1 Edw. (N. Y.) 447.

[2] Western Ins. Co. *v.* Eagle Fire Ins. Co. 1 Paige (N. Y.), 284; and see Trayser *v.* Trustees of Indiana Asbury University, 39 Ind. 556.

[3] Vanderkemp *v.* Shelton, 11 Paige (N. Y.), 28.

[4] McCormick *v.* Wilcox, 25 Ill. 274; Harshaw *v.* McKesson, 66 N. C. 266.

[5] Daily *v.* Kingon, 41 How. (N. Y.) Pr. 22.

[6] Kreichbaum *v.* Melton, 49 Cal. 50. See §§ 679–683.

then operates upon this title to the same extent as if it had been included in the mortgage.[1]

1582. When several persons have acquired undivided interests in the land subsequent to the mortgage as co-tenants, the decree will not apportion the debt among them.[2]

1583. If the complainant holds two mortgages covering in part the same premises, but securing different debts, one decree will be made for both debts instead of a separate decree for each ;[3] but if a subsequent purchaser or mortgagee has become interested in the property covered by one and not by the other, separate decrees should properly be made.[4]

1584. Death of mortgagor. — A judgment for foreclosure and sale without any provision as to a deficiency may be executed, notwithstanding the death of the mortgagor. It is to be enforced against the property and not against the person. There is no occasion to revive it or to bring in new parties.[5] The sale can be made and the purchaser let into possession on producing the deed of the referee or other officer making the sale.[6] So far as this part of the decree is concerned it is in the nature of a proceeding *in rem*, and the death of the mortgagor after the entry of the decree is no ground for staying its execution.[7]

The statutes which provide that no suits shall be brought against the estate of a deceased person for a year, or other specified time, after administration is taken upon his estate, do not suspend the right to prosecute a suit for foreclosure, when no judgment for a deficiency is sought.[8] The mortgagee may prove his claim and have it allowed against the estate of the mortgagor, and still proceed directly to foreclose.[9]

1585. Death of plaintiff. — Neither does the death of the plaintiff after judgment and before the sale give occasion to stay the sale or to revive the action.[10] Where, however, the plaintiff

[1] San Francisco *v.* Lawton, 18 Cal. 465.

[2] Perre *v.* Castro, 14 Cal. 519.

[3] Phelps *v.* Ellsworth, 3 Day (Conn.), 397.

[4] Enright *v.* Hubbard, 34 Conn. 197.

[5] Hays *v.* Thomae, 56 N. Y. 521; Harrison *v.* Simons, 3 Edw. Ch. 394; Cowell *v.* Buckelew, 14 Cal. 640.

[6] Lynde *v.* O'Donnell, 12 Abb. (N. Y.) Pr. 286.

[7] Nagle *v.* Macy, 9 Cal. 426. See Hunt *v.* Acre, 28 Ala. 580.

[8] Willis *v.* Farley, 24 Cal. 491.

[9] Moores *v.* Ellsworth, 22 Iowa, 299. *Contra*, Falkner *v.* Folsom, 6 Cal. 412.

[10] Lynde *v.* O'Donnell, 21 How. (N. Y.) Pr. 34; 12 Abb. Pr. 286.

dies before judgment, this cannot be perfected in his name, but his representatives must be substituted in his place.[1]

1586. A day for redemption before the sale was formerly allowed by some courts by virtue of their equity jurisdiction.[2] The mortgagor cannot object to a decree giving him this right, although it be unauthorized by law.[3] A time for redemption after the sale is in some states provided for, and in such case the decree must not direct the delivery of the deed until this time has passed.[4] As regards redemption, the decree should make the same provisions for it whether the mortgage be in the usual form, or be merely an absolute deed without a formal defeasance, or any defeasance at all.[5] Where redemption is allowed after sale, the officer is directed in the first place to execute a certificate to the purchaser, and in case there is no redemption within the time allowed by law to execute a deed.[6] In the mean time the mortgagor remains in possession, with no liability for rents and profits, or for use and occupation.[7]

In the absence of special provisions of statute, courts of equity may allow a period for redemption before a sale of the property, according to the circumstances of the case. This is always done in cases of strict foreclosure where the decree vests the complete title in the mortgagee.[8] The practice does not generally apply to cases of decrees for the sale of the property, because the debtor is then protected by his right to receive the surplus arising from the sale; but it has been extended by some courts to such cases.[9] As will be seen by reference to the statutes regulating foreclosure, it is in several states provided that there shall be a period of redemption after the sale, during which time the purchaser holds only a certificate of the sale entitling him to a deed at the close of the period if no redemption is made. In such case a decree that the sheriff shall execute a deed to the purchaser without

1 Gerry *v.* Post, 13 How. (N. Y.) Pr. 118.

2 This was the practice in Kentucky. Durrett *v.* Whiting, 7 T. B. Mon. 547; Woodard *v.* Fitzpatrick, 2 B. Mon. 61; Richardson *v.* Parrott, 7 Ib. 379.

3 Smith *v.* Hoyt, 14 Wis. 252.

4 Jones *v.* Gilman, 14 Wis. 450; Rhinehart *v.* Stevenson, 23 Ill. 524.

5 Briggs *v.* Seymour, 17 Wis. 255.

6 Boester *v.* Byrne, 72 Ill. 466; Rosseel *v.* Jarvis, 15 Wis. 571; Walker *v.* Jarvis, 16 Wis. 28. A direction to execute "a certificate as required by law" is sufficient.

7 Whitney *v.* Allen, 21 Cal. 233.

8 Perine *v.* Dunn, 4 Johns. (N. Y.) Ch. 140.

9 Harkins *v.* Forsyth, 11 Leigh (Va.), 294; Stockton *v.* Dundee Manuf. Co. 22 N. J. Eq. 56.

waiting for the expiration of the time limited for redemption is erroneous, but may be amended.[1]

3. *The Conclusiveness of the Decree.*

1587. The validity of the decree cannot be attacked collaterally for mere irregularities which do not go to the jurisdiction;[2] and jurisdiction is presumed from the decree.[3] Though the decree be erroneous, the title of one who has in good faith purchased under it is not affected by the error; and this is so even though the decree should afterwards be reversed or set aside for error or irregularity.[4]

If the mortgage was invalid in its origin, a decree of foreclosure has no effect whatever upon the property or its owners. Such was the case of a mortgage given by persons who claimed to be the trustees of a corporation and foreclosed; and afterwards it was established by decree of the court that the mortgagors had usurped the powers of the corporation, and had no authority to bind it.[5]

A decree of foreclosure entered before the debt has become due, or after the mortgage has been satisfied of record, is erroneous; and the decree should be set aside, unless in the latter case the entry of satisfaction be cancelled.[6]

1588. A judgment directing a sale of the mortgaged premises is conclusive as to all parties to the suit so long as it remains unreversed.[7] It does not matter that the plaintiff held the mortgage by assignment from the mortgagor as collateral security for a debt of his, and that he in this way had an interest in the mortgage; if the plaintiff, knowing this, makes him a party to the suit, and he does not answer, he cannot, after a judgment and sale of the property under it for a sum less than the debt for which the mortgage was held as collateral, maintain a bill to redeem. The interest of the mortgagor is not one prior to the

[1] Harlan *v.* Smith, 6 Cal. 173.

[2] Torrans *v.* Hicks, 32 Mich. 307; Ogden *v.* Walters, 12 Kans. 282; Reynolds *v.* Harris, 14 Cal. 667; Miller *v.* Sharp, 49 Cal. 233.

[3] Markel *v.* Evans, 47 Ind. 326; Keller *v.* Miller, 17 Ind. 206.

[4] Horner *v.* Zimmerman, 45 Ill. 14; Graham *v.* Bleakie, 2 Daly (N. Y.), 55; Burford *v.* Rosenfield, 37 Tex. 42.

[5] Brindernagle *v.* German Reformed Church, 1 Barb. Ch. 15.

[6] Russell *v.* Mixer, 39 Cal. 504.

[7] McCrackan *v.* Valentine, 9 N. Y. 42; Manigault *v.* Deas, Bailey (S. C.) Eq. 284; Murrell *v.* Smith, 51 Ala. 301.

mortgage, but one under the mortgage, and this is the ground upon which he is made a party to the foreclosure suit.[1]

1589. **Prior and adverse rights.** — Where a party has a right under the mortgage, and also a right prior to it, he is not precluded in respect to the prior right by a judgment of foreclosure, though the terms of it are broad enough to cover both rights. Only the rights and interests under the mortgage and subsequent to it can properly be litigated upon a bill of foreclosure.[2] One claiming adversely to the title of the mortgagor cannot be made a party to the suit for the purpose of trying his adverse claim. If he has a claim under the mortgage also, his claim prior to it cannot be divested by the decree. This prior claim is not a subject matter of litigation in the foreclosure suit, and remains unaffected by it. The decree is final only within the proper scope of the suit, which is to bar interests in the equity of redemption.[3] Therefore, where land was devised to one in trust to receive the rents and profits, and apply to the benefit of another for life, remainder to the trustee in fee for his own benefit, and the remainder-man and the tenant for life made a mortgage in which no allusion was made to the trust, it was held, upon a foreclosure of the mortgage, that the trust estate was not affected by the mortgage, or by the judgment of foreclosure, although the person named as trustee was in his individual capacity a party to the suit. The prior estate for life in trust not being subject to the mortgage, or within the power of the trustee to dispose of, remains unaffected.[4] In like manner if there be an outstanding right of dower in the wife of the mortgagor, the making of her a party to an action of foreclosure, and the rendering of a judgment foreclosing the rights of the defendants in the premises, do not affect this right. This remains the same as if she had not been made a party to the action.[5] If, however, the mortgage be given to secure the purchase money, the wife's dower is then subordinate to the mortgage, and is barred if she be made a party.[6] Moreover, the decree

1 Bloomer *v.* Sturges, 58 N. Y. 168.

2 Wade *v.* Miller, 32 N. J. L. 296; Elliott *v.* Pell, 1 Paige (N. Y.), 263; Eagle Fire Co. *v.* Lent, 6 Paige (N. Y.), 635; Holcomb *v.* Holcomb, 2 Barb. (N. Y.) 20; Frost *v.* Koon, 30 N. Y. 428; Lewis *v.* Smith, 11 Barb. (N. Y.) 152; 9 N. Y. 502; Corning *v.* Smith, 6 N. Y. 82; Lee *v.* Parker, 43 Barb. (N. Y.) 611.

3 Lewis *v.* Smith, 9 N. Y. 502.

4 Rathbone *v.* Hooney, 58 N. Y. 463.

5 Wade *v.* Miller, 32 N. J. L. 296; Merchants' Bank *v.* Thomson, 55 N. Y. 7.

6 Brackett *v.* Baum, 50 N. Y. 8. This decision relates to a power of sale mort-

is final and conclusive only against the owner and subsequent parties in interest, when they have been made parties to the suit; and is unvailing against any one interested in the premises who was not made a party.[1]

4. *The Amount of the Decree.*

1590. The decree directing a sale of the premises should find the exact amount due on the mortgage, and not leave this to be calculated by the officer.[2] A decree which simply orders the payment of the sum due on the mortgage debt, without finding the amount, is erroneous.[3] Where several mortgages upon separate parcels of land are foreclosed together, the decree must find the amount due upon each, and not the aggregate amount secured by all.[4] The parties themselves may fix the amount by agreement, and this will be adopted by the court in entering the decree.[5] The amount due may be determined by the court,[6] or for its convenience reference may be made to a master or clerk of court, or other officer, to ascertain the amount.[7] A part of the debt not due cannot be included.[8] But an instalment falling due before the hearing, although not due when the suit was brought, may be included.[9]

If the mortgagor desires an account taken of the amount of profits received by the mortgagee in possession, he should ask the action of the court in session, and upon a hearing by the court or before a master should offer his proof.[10] The question of the mortgagee's liability to account for rents and profits should be raised by the pleadings, otherwise the master under an order of reference will not without special directions entertain it.[11]

1591. Ordinarily the decree cannot include any instalment

gage foreclosed under the statute, but the reasoning applies here.

[1] Shores *v.* Scott River Co. 21 Cal. 135; Goodenow *v.* Ewer, 16 Cal. 461.

[2] Wernwag *v.* Brown, 3 Blackf. (Ind.) 457; Champlin *v.* Foster, 7 B. Mon. (Ky.) 104. As to certainty in the amount of the decree, see Mulvey *v.* Gibbons, 87 Ill. 367.

[3] Tompkins *v.* Wiltberger, 56 Ill. 385.

[4] Rader *v.* Ervin, 1 Mon. T. 632; Collier *v.* Ervin, 2 Ib. 335.

[5] Kelly *v.* Searing, 4 Abb. (N. Y.) Pr. 354; Nosler *v.* Haynes, 2 Nev. 53; Clarke *v.* Bancroft, 13 Iowa, 320.

[6] Vaughn *v.* Nims, 36 Mich. 297; Rollins *v.* Forbes, 10 Cal. 299; and see Davis *v.* Alvord, 94 U. S. 545.

[7] Ireland *v.* Wolman, 15 Mich. 253.

[8] King *v.* Longworth, 7 Ohio, 585.

[9] Manning *v.* McClurg, 14 Wis. 350.

[10] Hards *v.* Burton, 79 Ill. 504; and see Roberts *v.* Pierce, 79 Ill. 378.

[11] Wycoff *v.* Combs, 28 N. J. Eq. 40.

of the mortgage debt not due at the time;[1] though if an instalment not due when the suit was commenced falls due before the decree is entered, the amount of it is properly included.[2] When only a portion of the debt is due, the judgment, besides finding the amount actually due at the time it is entered, should find, also, the amount secured by the mortgage not then due, and should provide for a stay of proceedings, if, before the day of sale, the mortgagor pay the amount with costs.[3] But whether the amount not due should be stated or not depends upon the statutes and practice of the different states.[4]

When by the terms of the mortgage the mortgagee may, upon a default, elect to consider the entire amount of the mortgage debt as due, and he notifies the mortgagor of his election so to consider it before filing a bill for foreclosure, he is entitled to a decree for the full amount, although only a part of the debt is due.[5]

1592. Amount when mortgage is held as collateral security. — If a mortgage made without consideration paid by the mortgagee be assigned by the latter, as indemnity against the assignee's liability as indorser for the mortgagor, it is of course security only for the amount the indorser has been obliged to pay, and on foreclosure the decree should be for that amount only.[6] When a mortgage given to indemnify sureties is foreclosed, while suit is pending on the claim indemnified against, the decree may properly direct payment of the proceeds of sale into court, to await further order of court.[7]

If the complainant holds the mortgage assigned to him as collateral security for a specific debt of less amount than the mortgage, he can only have a decree for that debt, although pending the suit the mortgage is assigned to him absolutely. His remedy for the residue is by a supplemental bill; or in case the whole premises are sold upon the decree in the original suit, he might have remedy by petition for the surplus.[8]

And so if one holding a mortgage as collateral security at the

[1] King *v.* Longworth, 7 Ohio, 585. See § 1478.

[2] Howe *v.* Lemon, 37 Mich. 164; Vaughn *v.* Nims, 36 Mich. 297; Manning *v.* McClurg, 14 Wis. 350.

[3] Rice *v.* Cribb, 12 Wis. 179. See, also, as to the practice in such cases, Walker *v.* Hallett, 1 Ala. 379; Taggart *v.* San Antonio, &c. Mining Co. 18 Cal. 460.

[4] Hoffman on Referees, p. 229.

[5] Noonan *v.* Lee, 2 Black, 499.

[6] Van Deventer *v.* Stiger, 25 N. J. Eq. 224.

[7] Hunter *v.* Levan, 11 Cal. 11.

[8] Underhill *v.* Atwater, 22 N. J. Eq. 16.

request of the mortgagor, who owes the principal debt, assigns the mortgage to a third person for a sum less than the face of the mortgage, which sum is credited on the principal debt, and the mortgagor subsequently pays the balance of this debt, the mortgage in the hands of the assignee can be enforced for only the amount he paid for it either as against the mortgagor or against subsequent incumbrancers at the time of the assignment, for in such case that amount is the only part of the mortgage remaining unpaid.[1]

1593. If the mortgage secures a bond, the decree may be entered for the full amount of principal and interest due upon the bond, though it exceeds the amount of the penalty.[2] Even when the suit is founded on the bond alone, the plaintiff may recover the full amount of the penalty as a debt, and interest in addition, as damages for the detention of the debt.[3] When the suit is not upon the bond, but is a proceeding in equity upon the mortgage given to secure the bond, it has been considered that the lien upon the land is for the whole debt, both principal and interest, according to the condition of the mortgage. "The mortgage," says Sir William Grant,[4] "is to secure payment not of a bond, but of the sum for which the bond was given, together with all interest that may grow due thereon. The same sum, therefore, is differently secured by different instruments; by a penalty and by a specific lien. The creditor may resort to either, and if he resorts to the mortgage, the penalty is out of the question."

The American cases go further than this and hold that the real debt is the sum specified in the condition of the bond, with interest, and that the penalty is a mere matter of form of instrument

[1] Hoy *v.* Bramhall, 19 N. J. Eq. 74.

[2] Long *v.* Long, 16 N. J. Eq. 59. But see Harper *v.* Barsh, 10 Rich. (S. C.) Eq. 149; Mower *v.* Kip, 6 Paige (N. Y.) 88; reversing, S. C. 2 Edw. Ch. 165.

[3] Long *v.* Long, *supra*, and cases cited there.

[4] Clarke *v.* Lord Abingdon, 17 Ves. 106. Mr. Chancellor Green, in Long *v.* Long, *supra*, says, in reference to this distinction: "Looking at the question as a mere question of equity it will be found very difficult to assign a satisfactory reason why the obligee should be permitted to recover a larger amount upon the mortgage, which is a mere security for the bond, than he is permitted to recover upon the bond itself."

In Cruger *v.* Daniel, 1 McMul. (S. C.) Eq. 157, the Chancellor, referring to Clarke *v.* Lord Abingdon, very justly remarks that the mortgage there did not secure the bond, nor did it secure or refer to the penalty; and he holds that when the mortgage expressly refers to the bond and states the penalty, this is the entire debt secured, and the judgment cannot go beyond it.

declaring the debt. This is the view taken by Chancellor Walworth, and followed in other cases. "The amount secured by the condition of the bond is the real debt, which he was both legally and equitably bound to pay. And if he neglects to pay the money when it becomes due, there is no rule of justice or common sense which should excuse him from the payment of the whole amount of the principal and interest, whether it be more or less than the former penalty of the bond." [1]

1594. Interest. — The decree should be for the amount of the debt with interest thereon if it bears interest. If the interest has been paid by a note of the mortgagor, and this remains outstanding, the amount of such note should be included in the decree, not only as against the mortgagor, but as well against subsequent incumbrancers, although the interest is indorsed on the mortgage note as paid.[2] If the debt does not bear interest the decree should not include interest.[3]

1595. Exchange. — No allowance can be made for the difference of exchange, though the mortgage loan was negotiated in a foreign country where the mortgagee resides.[4]

1596. Insurance. — Premiums paid by the mortgagee for insurance against fire are charged upon the premises if the mortgagor has expressly made them such; but if paid without such agreement, they cannot be allowed in the judgment.[5] They are, in such case, paid merely for the mortgagee's own security.

If the mortgage be of a leasehold estate, the decree may include rent paid by the mortgagee for the protection of the estate.[6]

1597. Taxes. — A mortgagee cannot charge to the mortgagor, or have included in a decree in a foreclosure suit, the amount he has paid as taxes on his mortgage as for money at interest. He is as much bound to pay the tax upon this as upon his other property.[7] But he may be allowed for payments made upon taxes assessed upon the land, and which are a charge upon it, properly payable by the mortgagor.[8] The bill should contain a proper al-

[1] Mower *v.* Kipp, 6 Paige (N. Y.) 88; approved in Long *v.* Long, 16 N. J. Eq. 59; in which case Chancellor Green fully reviews the decisions.

[2] See § 925; Frink *v.* Branch, 16 Conn. 260.

[3] Heydle *v.* Hazlehurst, 4 Bibb (Ky.), 19.

[4] Chapman *v.* Robertson, 6 Paige (N. Y.), 627. See § 637.

[5] See § 414; Faure *v.* Winans, Hop. (N. Y.) Ch. 283.

[6] Robinson *v.* Ryan, 25 N. Y. 320.

[7] Pond *v.* Causdell, 23 N. J. Eq. 181.

[8] See §§ 1134, 1683; Faure *v.* Winans, Hop. (N. Y.) Ch. 283; Silver Lake Bank

legation and prayer in regard to taxes, otherwise the decree cannot properly direct an application of the proceeds of a sale to the payment of the delinquent taxes.[1] Even when the taxes remain outstanding and unpaid, the decree may, upon the application of the plaintiff, properly direct that the taxes due on the property be first paid out of the proceeds of the sale.[2] But after trial in the foreclosure suit, and without notice to the mortgagors, it is error to include the taxes in a judgment entered merely upon the production of the tax receipt.[3]

If the taxes were illegally assessed and the payment thereof might have been successfully resisted, the mortgagee will not be allowed to recover them.[4]

1598. Costs incurred in a previous action at law upon the note, and the expenses of a suit prosecuted in good faith to collect the debt out of personal property assigned as collateral security for the same debt, should be allowed in the decree as a part of the mortgage debt.[5]

1599. The disbursements made by the plaintiff in the proceedings for foreclosure, if legally and properly made, are always allowed to him, though not strictly costs.[6]

Payments made by the plaintiff, to protect his interest by redeeming from prior incumbrances, may be tacked to his own mortgage debt.[7] Inasmuch as the junior mortgagee is thus subrogated to the prior mortgage, his decree should include interest on that mortgage at the rate borne by it to the date of the decree.[8]

1600. Final judgment. — A judgment which directs the sale of the premises, and that the defendant pay any deficiency which may arise after such sale, is a final decree from which an appeal may be taken. It leaves nothing further to be adjudicated.[9] It

v. North, 4 Johns. (N. Y.) Ch. 370; Rapelye *v.* Prince, 4 Hill (N. Y.), 119; Burr *v.* Veeder, 3 Wend. (N. Y.) 412; De Leuw *v.* Neely, 71 Ill. 473; Vaughn *v.* Nims, 36 Mich. 297.

[1] De Leuw *v.* Neely, 71 Ill. 473.

[2] Poughkeepsie Sav. Bank *v.* Winn, 56 How. (N. Y.) Pr. 368; Opdyke *v.* Crawford, 19 Kans. 604; Easton *v.* Pickersgill, 55 N. Y. 310; Tuck *v.* Calvert, 33 Md. 210, 224; Ketcham *v.* Fitch, 13 Ohio St. 201.

[3] Northwestern Mut. Life Ins. Co. *v.* Allis, 23 Minn. 337.

[4] Atwater *v.* West, 28 N. J. Eq. 361.

[5] See § **1084**; Pettibone *v.* Stevens, 15 Conn. 19.

[6] Benedict *v.* Warriner, 14 How. (N. Y.) Pr. 568.

[7] Mosier *v.* Norton, 83 Ill. 519.

[8] Mosier *v.* Norton, *supra.*

[9] Morris *v.* Morange, 38 N. Y. 172; 4 Abb. Pr. N. S. 447; Bolles *v.* Duff, 43 N. Y. 469; 10 Abb. Pr. N. S. 399; 41 How. Pr. 355; Hipp *v.* Huchett, 4 Tex. 20.

is no objection to such judgment that it was not rendered by a court composed of the same judges who rendered the preliminary judgment, ascertaining and settling the rights of the parties and ordering judgment.[1] The judgment for a deficiency is entered upon the coming in, and confirmation of, the report of the sale without any further application to the court. The execution issues by virtue of the judgment for foreclosure.[2] Nothing remains to be judicially determined, and an appeal may be taken at once.[3] An appeal is the proper remedy for any errors in substance of the decree, or in the directions for carrying it into execution;[4] but the court has control of the judgment, though final, and may on proper application change the provisions of it, or insert other provisions for the benefit of any of the parties to the action.[5]

1601. No stay of proceedings can be had on account of a controversy between subsequent incumbrancers. In case of an appeal from a decree of sale on a bill to foreclose a mortgage, the amount of which and of other mortgages upon the property are not disputed, though there is a controversy about the validity of certain judgments subsequent to the mortgages, the court will not stay proceedings under the decree, but will order the surplus money to be brought into court to abide its decision; for in such case, if the decree should be reversed the mortgagor cannot be prejudiced, while the mortgage creditors would be prejudiced by a delay in recovering their claims.[6]

5. *Costs.*

1602. In general. — The mortgagee in a foreclosure suit as in other cases is ordinarily entitled to his costs of suit, when he prevails and obtains a decree, whether he be complainant or defendant.[7] If, however, he has acted oppressively in demanding a larger sum than was due on his mortgage, and the mortgagor has

[1] Chamberlain *v.* Dempsey, 36 N. Y. 144; reversing S. C. 9 Bos. 540.

[2] Bicknell *v.* Byrnes, 23 How. (N. Y.) 486.

[3] Bolles *v.* Duff, 43 N. Y. 469; Morris *v.* Morange, 38 N. Y. 172.

[4] Barnard *v.* Bruce, 21 How. (N. Y.) Pr. 360.

[5] Livingston *v.* Mildrum, 19 N. Y. 440.

[6] Schenck *v.* Conover, 13 N. J. Eq. 31.

[7] Loftus *v.* Swift, 2 Sch. & Lef. 642; Bartle *v.* Wilkin, 8 Sim. 238; Witherell *v.* Collins, 3 Mad. 255; Concklin *v.* Coddington, 1 Beas. (N. J.) 250; Benedict *v.* Gilman, 4 Paige (N. Y.), 58; and without reference to his success. Slee *v.* Manhattan Co. 1 Paige (N.Y.), 48; Vroom *v.* Ditmas, 4 Ib. 526.

been diligent in endeavoring to ascertain from him the amount of the incumbrance in order to pay it, costs will be denied to him, or possibly in some cases awarded against him ;[1] but merely claiming in good faith a larger sum than the court finally decides that he is entitled to is no ground for refusing him his costs.[2] He may be made to pay costs if he has rejected a tender of the full amount due him ;[3] or if the litigation has in any way been occasioned by his misconduct.

1603. The matter of costs depends very much upon the statutes and practice of the several states, which are quite unlike. The foreclosure suit being an equitable one, the costs are generally within the discretion of the court.[4] But although there is no fixed rule for giving costs as in courts of law, the courts rarely, if ever, refuse costs.[5] The disbursements made for carrying on the suit are not strictly costs, but if they are legally made and are of a reasonable amount they are allowed to the party making them.[6] Provision is sometimes made that a plaintiff may serve upon a defendant a notice that no personal claim is made upon him ; and that in such case no service of the complaint by copy need be made on such defendant; and then in case he unnecessarily defends, he is liable in costs to the plaintiff.[7] If a copy of the complaint be served, no notice for this purpose is required.[8]

1604. If subsequent incumbrancers unnecessarily appear and answer, they are not entitled to costs until after the plaintiff's debt and costs are satisfied;[9] and it is not necessary that they should appear to a foreclosure suit if their claims are correctly set

[1] Detillin *v.* Gale, 7 Ves. 583 ; Large *v.* Van Doren, 14 N. J. Eq. 208 ; Vroom *v.* Ditmas, 4 Paige (N. Y.), 526 ; Van Buren *v.* Olmstead, 5 Ib. 9.

[2] Loftus *v.* Swift, 2 Sch. & Lef. 642.

[3] Shuttleworth *v.* Lowther, 7 Ves. 586 ; Pratt *v.* Stiles, 9 Abb. (N. Y.) Pr. 150; 17 How. Pr. 211.

In New York it is held that the fact that a tender has been made makes no difference in the amount of the costs. Barton *v.* Cleveland, 16 How. (N. Y.) Pr. 364 ; 7 Abb. Pr. 339 ; Pratt *v.* Ramsdell, 16 How. (N. Y.) Pr. 59, 62 ; 7 Abb. Pr. 340, n. ; Stevens *v.* Veriane, 2 Lans. (N. Y.) 90.

[4] Garr *v.* Bright, 1 Barb. (N. Y.) Ch. 157 ; O'Hara *v.* Brophy, 24 How. (N. Y.) Pr. 379 ; Bartow *v.* Cleveland, 16 Ib. 364 ; 7 Abb. Pr. 339 ; Pratt *v.* Ramsdell, 16 How. (N. Y.) Pr. 59 ; 7 Abb. Pr. 340, n. ; Gallaghar *v.* Egan, 2 Sandf. (N. Y.) 742 ; Lossee *v.* Ellis, 13 Hun (N. Y.), 655.

[5] Stevens *v.* Veriane, 2 Lans. (N. Y.) 90 ; Eastburn *v.* Kirk, 2 Johns. (N. Y.) Ch. 317 ; Garr *v.* Bright, *supra*.

[6] Benedict *v.* Warriner, 14 How. (N. Y.) Pr. 568.

[7] Code of N. Y. §§ 131, 157.

[8] O'Hara *v.* Brophy, 24 How. (N. Y.) Pr. 379.

[9] Merchants' Ins. Co. *v.* Marvin, 1 Paige (N. Y.), 557 ; Barnard *v.* Bruce, 21 How. (N. Y.) Pr. 360.

forth in the bill, as their rights will be fully protected under the decree. Where the court has discretionary powers in regard to costs, and the appearance of such incumbrancers though proper is not necessary, the plaintiff, upon receiving the amount due him after he has brought suit, may discontinue against subsequent incumbrancers who have appeared, without costs to them.[1] Ordinarily, however, a subsequent mortgagee would be entitled to costs in such case.[2] If a second mortgagee after being made a party to a suit to foreclose a prior mortgage receives payment and offers to disclaim, he is entitled to his costs.[3]

A subsequent purchaser of the premises may make himself personally liable for costs, though not liable for the debt, if he makes an unreasonable and unfounded defence to the suit, and the property is not of sufficient value to pay the incumbrances.[4]

1605. Defendants who properly appear and answer are entitled to costs as a general rule. But several defendants having the same defence and employing the same solicitor are not allowed to swell the costs by filing separate answers.[5] A prior mortgagee whether properly made a party for the purpose of having the amount of his claim ascertained,[6] or whether improperly joined, is entitled to costs, to be paid out of the fund in the one case, or in the other by the plaintiff personally.[7]

1606. Counsel fees. — A reasonable fee for the expense of foreclosing beyond the costs allowed by law may be contracted for in the mortgage; and the court will consider the amount stipulated for by the parties to be reasonable, unless it be extravagantly large and extortionate. A percentage may be allowed instead of a fixed sum as a fee.[8]

A stipulation in a mortgage, allowing counsel fees for a foreclosure, does not entitle the plaintiff to counsel fees unless he has paid them or become liable for them; he cannot recover such fees

[1] Gallagher *v.* Egan, 2 Sandf. (N. Y.) 742.

[2] Young *v.* Young, 17 N. J. Eq. 161.

[3] Day *v.* Gudgen, L. R. 2 Ch. Div. 209.

[4] Danbury *v.* Robinson, 14 N. J. Eq. 324.

[5] Danbury *v.* Robinson, *supra.*

[6] Chamberlain *v.* Dempsey, 36 N. Y. 144, 147; Boyd *v.* Dodge, 10 Paige (N. Y.), 42.

[7] Millaudon *v.* Brugiere, 11 Paige (N. Y.), 163.

[8] See §§ 359, 635; Cox *v.* Smith, 1 Nev. 161; McLane *v.* Abrams, 2 Nev. 199. In this case a stipulation for ten per cent. on the amount of the mortgage, $6,000, was not regarded as unreasonable. In Daly *v.* Maitland (Pa.), 13 West. Jur. 204, a stipulation for a commission of five per cent. on a mortgage of $14,000 was considered to be unreasonable.

for personally prosecuting his foreclosure.[1] It is not necessary that there should be any averment that the amount of fees stipulated for in the deed is reasonable, as they are a mere incident to the cause of action, and may be fixed by the court at its discretion.[2] If there be no stipulation in the mortgage for counsel fees they cannot be recovered. This is wholly a matter of contract;[3] unless provided for by statute as is the case in some states, as, for instance, New York.[4]

A stipulation to pay a reasonable attorney's fee for foreclosure to be taxed in the judgment is not usurious and will be enforced.[5] The debtor, by neglecting or refusing to pay, imposes upon the mortgagee the expense of resorting to law to enforce his rights, and it is only just that the expenses of foreclosure should be borne by the party whose own wrong has made it necessary to incur them. A stipulation for the payment of an attorney's fee of $25, on the foreclosure of a mortgage of $11,000, is not unreasonable. It is presumed that such stipulations are made in reference to the costs and expenses otherwise chargeable, and that such fee is an allowance additional to these.[6] A stipulation of five per cent. of the amount of the mortgage for counsel fees is additional to the costs recoverable by statute.[7] A provision in the mortgage that the mortgagor shall in case of foreclosure pay the costs, "and fifty dollars as liquidated damages for the foreclosure of the mortgage," was held to be void, because so indefinite that the court could not tell whether the payment was intended to be for something legal or illegal. A judgment rendered under such a stipulation for fifty dollars as attorney's fees was declared erroneous.[8] But a stipula-

[1] Patterson *v.* Donner, 48 Cal. 369.

[2] Carriere *v.* Minturn, 5 Cal. 435.

[3] Sichel *v.* Carrillo, 42 Cal. 493; Stover *v.* Johnnycake, 9 Kans. 367.

[4] Code, § 109; and see Hunt *v.* Chapman, 62 N. Y. 333.

[5] § 635; Weatherby *v.* Smith, 30 Iowa, 131; Gower *v.* Carter, 3 Iowa, 244; Gilmore *v.* Ferguson, 28 Iowa, 220; Conrad *v.* Gibbon, 29 Iowa, 120; McGill *v.* Griffin, 32 Iowa, 445; Nelson *v.* Everett, 29 Iowa, 184. In Williams *v.* Meeker, 29 Iowa, 292, an attorney's fee of $75 was allowed. *Contra*, Thomasson *v.* Townsend, 10 Bush (Ky.), 114; Rilling *v.* Thompson, 12 Ib. 310.

[6] Hitchcock *v.* Merrick, 15 Wis. 522; Rice *v.* Cribbs, 12 Wis. 179; Boyd *v.* Sumner, 10 Wis. 41; Tallman *v.* Truesdell, 3 Wis. 454. In Remington *v.* Willard, 15 Wis. 583, the mortgage stipulated for a fee of $75, and the court allowed under the Code five per cent. on the amount due, being a very much larger sum. A stipulation for $100 solicitor's fees, in a mortgage for $10,000, was enforced in Pierce *v.* Kneeland, 16 Wis. 672.

[7] Gronfier *v.* Minturn, 5 Cal. 492; Carriere *v.* Minturn, 5 Cal. 435.

[8] Foote *v.* Sprague, 13 Kans. 155; Kurtz *v.* Sponable, 6 Kans. 395; Tholen *v.* Duffy,

tion that the mortgagee shall be entitled "to a judgment for the possession of said premises, and costs, expenses, and attorney's fees of ten per cent. of the amount due for foreclosing said mortgage," is valid; and on a mortgage debt of $4,000, or less, the amount is not so excessive that a court of equity will refuse to enforce it.[1] Under a provision in a power of sale for an attorney's fee in case of foreclosure, no allowance can be made if the mortgage is foreclosed in chancery instead.[2] A stipulation that "an attorney's fee of fifty dollars for foreclosure, with costs of suit and accruing costs," shall be taxed against the mortgagor, does not authorize such a fee in case there be a decree for foreclosure, and the mortgagor pays the debt after suit is commenced but before a decree of sale is entered.[3]

It is now provided by statute in Kansas that it shall not be lawful for any person or corporation to contract for the payment of attorney's fees in any note, bond, or mortgage; that any stipulation for that purpose is void and cannot be enforced.[4]

A mortgagee in whose favor there is a stipulation that he shall be entitled to an attorney's fee in any action that he may bring on the mortgage may claim such fee when as a defendant in a foreclosure suit he sets up his cause of action; for this is in effect bringing an action on the mortgage.[5] Courts of equity may allow a mortgagee counsel fees incurred in defending his title, without any express contract;[6] but fees paid to counsel for resisting an application by the assignee in bankruptcy of the mortgagor, to enjoin a sale under a power in the mortgage, do not constitute a payment in defence of the mortgage title.[7]

1607. An irregular attempt at foreclosure, abandoned after

7 Kans. 405; Stover *v.* Johnnycake, 9 Kans. 367.

[1] Sharp *v.* Barker, 11 Kans. 381.

[2] Sage *v.* Riggs, 12 Mich. 313; Hardwick *v.* Bassett, 29 Mich. 17. In this case the court below thought a fee of $75 "a reasonable number of dollars," according to the terms of the mortgage.

[3] Jennings *v.* McKay, 19 Kans. 120; distinguished from Life Asso. *v.* Dale, 17 Kans. 185.

[4] Dassler's Stat. 1876, c. 68, § 8 a; Laws, 1876, c. 77, § 1.

This statute took effect March 1, 1876, and it provides that in all existing mortgages in which no amount is stipulated as attorney's fees, not more than eight per cent. on sums of $250 or under, and no more than five per cent. on all sums over $250, shall be allowed by any court as attorney's fees. Existing mortgages in which a sum has been stipulated as attorneys' fees are not affected.

[5] Lanoue *v.* McKinnon, 19 Kans. 408.

[6] Lomax *v.* Hide, 2 Vern. 185; Hunt *v.* Townes, 9 Ves. 70.

[7] Maus *v.* McKellip, 38 Md. 231.

a single publication of the notice on account of a defect in this, does not entitle the mortgagee to any attorney's fee provided for in the mortgage upon a foreclosure of it. By declining a tender of the full amount due, because such fee is not paid in addition, he renders himself liable to a statutory penalty for refusing to discharge a mortgage.[1] A mortgagee is not generally entitled to costs of a foreclosure defective through an error of his own in the proceedings, whereby a new foreclosure is rendered necessary.[2]

Where a mortgage provided that "in the event of foreclosure sixty dollars attorney's fee shall be by the court also taxed, and included in the decree of foreclosure," it was held that a tender before decree not including this fee was good, and that this fee could not be collected except by having it taxed in the decree.[3]

[1] Collar *v.* Harrison, 30 Mich. 66.
[2] Clark *v.* Stilson, 36 Mich. 482.
[3] Schmidt *v.* Potter, 35 Iowa, 426.

CHAPTER XXXVI.

FORECLOSURE SALES UNDER DECREE OF COURT.

I. Mode and terms of sale, 1608–1615.
II. Sale in parcels, 1616–1619.
III. Order of sale, 1620–1632.
IV. Conduct of sale, 1633–1636.
V. Confirmation of sale, 1637–1641.
VI. Enforcement of sale against the purchaser, 1642–1651.
VII. The deed, and passing of title, 1652–1662.
VIII. The delivery of possession to purchaser, 1663–1667.
IX. Setting aside of sale, 1668–1681.

1. *Mode and Terms of Sale.*

1608. Nature of a foreclosure sale. — A sale under a decree of court is in contemplation of law the act of the court. It is made through the instrumentality of some officer designated by statute or appointed by the court. Whatever name be given to this officer, whether master in chancery, referee, trustee, commissioner, or sheriff,[1] in making the sale he acts as the agent of the court, and must report to it his doings in the execution of its order. This report should set out all the proceedings incident to the sale, the manner and particulars of it, the conveyance to the purchaser, and the payment of the proceeds.[2] When the sale is confirmed it becomes the act of the court, or, in other words, a judicial sale; but, until confirmed, no title passes to the purchaser. In this respect the sale is unlike a sheriff's sale, which is a ministerial act, and the officer, and not the court, is regarded as the vendor; and which, if made conformably to law, is final and valid, and passes the title.[3]

[1] Heyer *v.* Deaves, 2 Johns. (N. Y.) Ch. 154; Mayer *v.* Wick, 15 Ohio St. 548. In the federal courts the sale is usually made by the marshal of the district, or by a master specially appointed. Blossom *v.* Railroad Co. 3 Wall. 196, 205. The sheriff or other officer to whom the order is given may sell, though his term of office afterwards expires before the sale. Cord *v.* Hirsch, 17 Wis. 403.

[2] For form of report used in New York, see 5 Wait's Practice, 228.

[3] Rorer's Jud. Sales, §§ 1–68; Harrison *v.* Harrison, 1 Md. Ch. Dec. 335; Williamson *v.* Berry, 8 How. 495, 546.

1609. What may be sold. — Mortgages of estates for years, as well as those in fee, may be foreclosed by sale.[1]

Generally no other or greater interest than that covered by the mortgage can be sold except by consent, or in case of an after-acquired title of the mortgagor.[2] On a bill by a junior mortgagee nothing more than the equity of redemption mortgaged to him can be decreed to be sold, unless the prior mortgagee consents that the decree may be made for the sale of the property, and the payment of his mortgage also.[3]

Furthermore, the order of sale cannot embrace other lands not described in the mortgage;[4] though when through mistake the description in a mortgage did not embrace a portion of the land intended to be conveyed, but the purchaser supposed he was buying the whole estate intended to be mortgaged, he was protected in his claim under the sale to the whole.[5]

If two tracts of land are embraced in the mortgage when only one of them was intended to be mortgaged, that may be foreclosed alone without a reformation of the deed, which would be necessary in case of a misdescription of the land.[6]

1610. Subsequent incumbrances. — When a junior mortgagee whose debt is due is a party to a suit to foreclose a prior mortgage, the court may decree a sale of so much of the property as will be sufficient to satisfy both mortgages and all intermediate liens; and the master may be directed to ascertain the amount of such liens previous to the sale. But the junior mortgagee cannot be paid until the master's report is filed and the surplus money brought into court, so that other persons may have an opportunity to present their claims.[7] Ordinarily, however, the amounts of subsequent incumbrances will not be determined until the question arises in its proper course upon application made for the surplus. The mortgagee cannot be compelled to suspend proceedings to allow subsequent parties to contest their rights as between

[1] Johnson *v.* Donnell, 15 Ill. 97; Lansing *v.* Albany Ins. Co. Hopk. (N. Y.) Ch. 102.

[2] See § 1581.

[3] Roll *v.* Smalley, 6 N. J. Eq. (2 Halst.) 464.

[4] Wilkinson *v.* Daniels, 1 Greene (Iowa), 179.

[5] See §§ 97, 1464.

[6] Conklin *v.* Bowman, 11 Ind. 254; Walker *v.* Sellers, Ib. 376; Miller *v.* Kolb, 47 Ind. 220.

[7] Beekman *v.* Gibbs, 8 Paige (N. Y.), 511; Barnes *v.* Stoughton, 10 Hun (N. Y.), 14.

themselves. These must be settled upon a reference to a master of their respective claims to the surplus money.[1]

1611. **Questions of priority of right to the proceeds of sale or of equities as to the order of sale** cannot be litigated between the defendants before judgment is entered for the plaintiff against whom they set up no equities or defence.[2] But questions as to priority of claims upon different portions of the premises should be settled by the court before a sale is made, rather than after the sale, as the parties interested are then able to act intelligibly as to the bidding at the sale, and the officer selling can directly afterwards proceed to the distribution of the proceeds.[3] If, however, these questions relate merely to the distribution of the surplus and do not affect the order of sale, they are properly settled upon application for the surplus after sale.[4]

1612. **The notice of sale.** — The time and place of the sale and the terms and conditions of it may be prescribed by the court,[5] though it generally leaves all these details to the master or other officer charged with the conduct of it; but all his acts in relation to it are subject to the direction of the court at all times, and to its sanction when the sale is reported for confirmation. The notice of the sale, when not regulated by statute, may be prescribed by the decree, or left to the officer intrusted with the execution of the decree. It should fix the time of sale, and the hour of the day at which the sale is to be made should be designated; otherwise if a reasonable price is not obtained for the property, the sale will be set aside.[6]

[1] Miller *v.* Case, Clarke (N. Y.) Ch. 395.

[2] Smart *v.* Bement, 4 Abb. (N. Y.) Dec. 253.

[3] Snyder *v.* Stafford, 11 Paige (N. Y.), 71.

[4] Schenck *v.* Conover, 13 N. J. Eq. (2 Beas.) 31; Union Ins. Co. *v.* Van Rensselear, 4 Paige (N. Y), 85.

[5] Sessions *v.* Peay, 23 Ark. 39.

[6] Trustees of Schools *v.* Snell, 19 Ill. 156. The decree directed the master to sell, upon four weeks' notice of the time, terms, and place of sale. The notice stated that the sale would be made on the 2d day of January. "The proof showed that the property was sold at an enormous sacrifice. The notice as to the time of sale was insufficient. The 2d day of January included the astronomical period of a revolution of the earth upon its axis twenty-four hours. 2 Black. Com. 141, and notes. The sale, therefore, might, consistently with the notice, have been made immediately before midnight of that day, and if it was so made it is voidable. The object of a public sale is, by fairness and competition, to evolve the full value of the property exposed, and produce that value in the form of money. This can, as a general rule, only be done by making the sale at a convenient or public place, accessible to bidders, and during the ordinary business hours of the day. The notice should have stated the hour of sale, or that the

Where a decree directed notice of a sale to be published in a certain paper, which was after the decree and before the notice merged in another paper and its name changed, and on application to the judge at chambers he directed the sale to be advertised in the paper called by its new name, the publication of the notice in that paper in accordance with such order was held valid and sufficient.[1]

Generally when a notice is required to be published once in each week for a certain number of weeks, as, for instance, three weeks, it is not necessary that the time between the first and last publications should be three full weeks; but only that one publication should be made on some day of each week.[2]

The notice in its contents should be drawn in fairness both to those who are interested in the property and to those who may purchase it, and should neither contain uncalled for statements calculated to depreciate the price unduly,[3] nor on the other hand should it contain statements which might unduly enhance the price or mislead the purchaser.[4]

1613. Terms of sale. — The officer making the sale should prepare the terms of sale, a copy of which, with a description of the premises, should be signed by the purchaser, though it is held that sales made under decrees of court are not within the statute of frauds.[5] The auctioneer, moreover, being the agent of both parties, his memorandum of the sale is binding upon the purchaser;[6] but his memorandum must have his signature.[7] This contract, however, is not regarded as complete until the officer's report of the sale has been confirmed. The terms of sale, according to the usual practice, provide that a deposit shall be paid down at the time of sale. The amount of this varies according to the circumstances of the case, but is generally about ten per cent.

sale would be made between certain named hours of the business portion of the day."

[1] Sage *v.* Cent. R. R. Co. of Iowa (U. S. Supreme Ct.), 13 West. Jur. 218.

[2] Sheldon *v.* Wright, 5 N. Y. 497; Olcott *v.* Robinson, 21 N. Y. 150; rev'g 20 Barb. 148; Wood *v.* Morehouse, 45 N. Y. 369; aff'g 1 Lans. 405; Chamberlain *v.* Dempsey, 22 How. (N. Y.) Pr. 356; 13 Abb. Pr. 421.

[3] Marsh *v.* Ridgway, 18 Abb. (N. Y.) Pr. 262.

[4] Veeder *v.* Fonda, 3 Paige (N. Y.), 94.

[5] Sugden's Vendors, 148; Atty. Gen. *v.* Day, 1 Ves. Sen. 221; Fulton *v.* Moore, 25 Pa. St. 468; Halleck *v.* Guy, 9 Cal. 181. See § 1866.

[6] McComb *v.* Wright, 4 Johns. (N. Y.) Ch. 659; Hegeman *v.* Johnson, 35 Barb. (N. Y.) 200; Nat. Fire Ins. Co. *v.* Loomis, 11 Paige (N. Y.), 431.

[7] Bicknell *v.* Byrnes, 23 How. (N. Y.) Pr. 486.

of the purchase money. It is proper to keep the biddings open till the deposit is made, and to resume the sale if the purchaser refuses or neglects to make it.[1] Under special circumstances the sale may be adjourned to another day, and resumed if the deposit is not made in the mean time.[2]

Where a purchaser in good faith left the place of sale without complying with the conditions of sale, under the supposition that he had until the next day to do this, and the referee then and there sold the premises again for a less price, the court ordered a resale upon the first purchaser's giving security to bid the same amount again.[3]

At a sale by a mortgage trustee late in the afternoon of Saturday, the terms of which were announced to be cash, the holder of the mortgage notes bid $10,070, and exhibited his certified check upon a bank for $10,000, and the property was struck off to him, although another person bid $2,938, and tendered the money for his bid. On Monday the highest bidder paid over the money bid, and a confirmation of the sale was asked for. The other bidder contested the confirmation; but the court held that there had been a substantial compliance with the terms of the sale and confirmed it.[4] Besides, the holder of the mortgage notes may, it seems, comply with the terms of the sale by merely indorsing the amount of the bid on the notes. The formality of paying over the money to the trustee and receiving it back from him is unnecessary.[5]

1614. Deposit required. — The trustee or commissioner appointed to conduct the sale may properly require that the purchaser shall deposit or pay some portion of the price in cash at the time of sale; and if the sum be not so large as reasonably to deter persons from bidding, this requirement will not prevent a ratification of the sale.[6] But a requirement of the immediate payment in cash of the whole purchase money at the time of sale is an oppressive and unjust act towards the mortgagor, and a court of equity would set the sale aside.[7] If the mortgagee

[1] Lents *v.* Craig, 13 How. (N. Y.) Pr. 72; 2 Abb. Pr. 294; Sherwood *v.* Reade, 8 Paige (N. Y.), 633.

[2] Hoffman's Referees, 236.

[3] Lents *v.* Craig, *supra.*

[4] Jacobs *v.* Turpin, 83 Ill. 424.

[5] Jacobs *v.* Turpin, *supra.*

[6] Md. Perm. Land & Build. Soc. of Balt. *v.* Smith, 41 Md. 516. The deposit required was $300, the property selling for $5,600.

[7] Goldsmith *v.* Osborne, 1 Edw. (N. Y.) Ch. 560.

without leave purchases at such a sale, he will be considered merely a mortgagee in possession of a redeemable estate.

It is proper to provide in a decree that in case any other person than the mortgagee becomes purchaser at the sale, he shall be required to pay at once, in cash, a part of the bid as earnest money; and no objection can be taken that the same requirement is not made of the mortgagee.[1]

The trustee is not obliged to accept the highest bidder if he has reason to apprehend that he has not the ability or intention to comply with the terms of sale. The requirement of a deposit is a reasonable precaution in order to insure the completion of the sale, or to cover the costs and expenses of it should it fail by the purchaser's default.[2]

1615. Sale on credit. — Ordinarily, except with the consent of both parties, the sale is for cash. The sheriff has no authority to sell on credit in the absence of any authority given in the deed.[3] But the mortgagee may allow time to the purchaser, and whether this arrangement be made before or after the sale, it does not injure the mortgagor, and is no ground for setting aside the sale, if the credit is only for the amount due to him.[4] But he cannot allow credit beyond this, except with the consent of the other incumbrancers entitled to the proceeds of sale.[5] A court of equity may order the sale to be made on credit without violating the obligation of the mortgage contract;[6] unless the mortgage deed expressly provides that the sale shall be for cash; in which case the requirement is obligatory and cannot be disregarded by the court.[7] If a referee, with the consent of the parties in interest, sells the premises on time, and the sale is reported and confirmed, it will not be set aside on the motion of a creditor of the deceased mortgagor.[8]

When the terms of sale are cash, the purchaser must pay cash,

[1] Sage *v.* Cent. R. R. Co. of Iowa, 13 West. Jur. 218.

[2] Gray *v.* Veirs, 33 Md. 18.

[3] Sauer *v.* Steinbauer, 14 Wis. 70; Sedgwick *v.* Fish, Hopk. (N. Y.) Ch. 594.

[4] Mahone *v.* Williams, 39 Ala. 202; Rhodes *v.* Dutcher, 6 Hun (N. Y.), 453.

[5] And see Chaffraix *v.* Packard, 26 La. Ann. 172.

[6] Stoney *v.* Shultz, 1 Hill (S. C.) Ch. 465, 500; Lowndes *v.* Chisholm, 2 McCord (S. C.) Ch. 455.

[7] Crenshaw *v.* Seigfried, 24 Gratt. (Va.) 272. See to the contrary, Mitchell *v.* McKinny, 6 Heisk. (Tenn.) 83.

[8] Rhodes *v.* Dutcher, 6 Hun (N. Y.), 453.

and cannot comply with such terms by a tender of the note of the person entitled to the proceeds of the sale.[1]

2. *Sale in Parcels.*

1616. A sale in parcels may be required by statute or by court.[2] In regulating foreclosure sales in equity, several states have by statute provided that the property shall be sold in parcels when practicable; but that where a sale of the whole will be more beneficial to the parties, the decree shall be made accordingly. But courts of equity, without statutory provisions, apply the same rules; these provisions in fact being only confirmatory of principles by which courts of equity are necessarily governed in suits of foreclosure.[3] When the decree has directed the sale of the whole premises for the payment of an instalment then due, the court may in its discretion afterwards regulate the execution of the decree by directing a sale of a part only, if the premises are divisible, and may, upon the maturity of other instalments, direct further sales.[4] In determining whether the premises shall be sold together or in parcels, the court should direct the sale to be made in such manner as that the parties having equities subject to the mortgage shall not be prejudiced.[5]

It may sometimes happen that even when the mortgage describes the property in separate parcels, and the amount due on the mortgage may be raised by a sale of a portion of them, it may be necessary for the proper protection of the rights of subsequent incumbrancers that the property should be sold together;[6] and even after a sale of a part, the court, still having jurisdiction of the parties and the subject, may, for the protection of the parties, make a supplementary order for the sale of the remainder.[7]

If an order to sell in parcels be erroneous, a party aggrieved

[1] Pursley *v.* Forth, 82 Ill. 327. See Sage *v.* Cent. R. R. Co. of Iowa, 13 West. Jur. 218.

[2] As to sales in parcels under powers in mortgages and trust deeds, see chapter xi, division 9.

[3] Livingston *v.* Mildrum, 19 N. Y. 440, 443, per Selden, J.; Campbell *v.* Macomb, 4 Johns. (N. Y.) Ch. 534. See, also, Gregory *v.* Purdue, 32 Ind. 453; Magruder *v.* Eggleston, 41 Miss. 284; Am. Life & Fire Ins. & Trust Co. *v.* Ryerson, 2 Halst. Ch. (N. J.) 9; Wilmer *v.* Atlanta, &c. R. R. Co. 2 Woods, 447.

[4] Am. Life & Fire Ins. & Trust Co. *v.* Ryerson, *supra.*

[5] De Forest *v.* Farley, 62 N. Y. 628; Livingston *v.* Mildrum, *supra;* and see Beekman *v.* Gibbs, 8 Paige (N. Y.), 511; Malcolm *v.* Allen, 49 N. Y. 448; Blazey *v.* Delius, 74 Ill. 299.

[6] Gregory *v.* Campbell, 16 How. (N. Y.) Pr. 417.

[7] Livingston *v.* Mildrum, 19 N. Y. 440; De Forest *v.* Farley, 4 Hun (N. Y.), 640.

should apply to have the order amended; it is not a defence to the suit which can be taken advantage of by plea, answer, or demurrer.[1]

1617. When wishes of the mortgagor to be followed. — If there be no question that the property is ample to satisfy the debt, whether sold together or in parcels, and there are no subsequent equities to be considered, the wishes of the owner in respect to the mode and order of sale should be followed. The mortgagee in such case has no right to direct whether the sale shall be in one way or the other.[2]

But in a case where the security was doubtful, and the property consisted of one parcel, which after the making of the mortgage was laid out in streets and building lots, the mortgagee objected to a sale in parcels, unless security should be given him, because that portion of the land laid out for streets would not be included; and a sale in one parcel was held proper.[3] A mortgagee who holds a mortgage upon the entire interest in a lot of land cannot be called upon to allow a sale of an undivided interest. Even if the mortgage be made by joint-tenants, who desire a separate sale of undivided interests to enable them more easily to adjust their rights as between themselves.[4]

1618. Whether the property shall be sold entire or in parcels is in some states determined by the court, generally through a reference, and in others is left to the discretion of the officer making the sale.[5] When determined by the court, the order of sale sometimes directs the form and manner of the division, and designates the part first to be sold,[6] or more properly to be offered for sale.[7] An order once made will not be disturbed without good cause.[8] When by statute or rule of court the officer deter-

[1] Horner *v.* Corning, 28 N. J. Eq. 254.

[2] Walworth *v.* Farmers' Loan & Trust Co. 4 Sandf. (N. Y.) Ch. 51; Brown *v.* Frost, 1 Hoffm. (N. Y.) 41; and see King *v.* Platt, 37 N. Y. 155; Caufmann *v.* Sayre, 2 B. Mon. (Ky.) 202, and see Wolcott *v.* Schenck, 23 How. (N. Y.) Pr. 385.

[3] Griswold *v.* Fowler, 24 Barb. (N. Y.) 135; Lane *v.* Conger, 10 Hun (N. Y.), 1, and cases cited; and see Ellsworth *v.* Lockwood, 9 Ib. 5, 48; S. C. 42 N. Y. 89.

[4] Frost *v.* Bevins, 3 Sandf. (N. Y.) Ch. 188.

[5] See statutory regulations of the different states.

[6] Brugh *v.* Darst, 16 Ind. 79; Bard *v.* Steele, 3 How. (N. Y.) Pr. 110.

[7] Cissna *v.* Haines, 18 Ind. 496. This order may be based on the facts shown at the hearing, or upon the consent of the parties, although there be no foundation for it in the pleadings. Cord *v.* Southwell, 15 Wis. 211.

[8] Vaughan *v.* Nims, 36 Mich. 297.

mines upon these matters, he must sell in parcels in just the same cases in which the statute or the general principles of equity would make this course obligatory upon the court; and if he makes it otherwise, the court will set it aside.[1] A statutory provision directing the sale of only so much as will pay the amount due with costs, if a division can be made, is peremptory upon the court,[2] leaving only the determination of the question whether such division can be made without injury to the whole. A sale, however, made without regard to this provision is only voidable, and not void.[3]

Without any statutory requirement a court of equity will order a sale in parcels when the property consists of distinct tracts, together worth much more than the debt secured.[4] The mere fact that the premises are a meagre security and are going to ruin and decay does not justify a sale of the entire premises for a debt only partly due.[5] A decree for such a sale should rest upon an allegation and finding that the premises cannot be divided without manifest injury to all parties concerned.[6]

The court having ordered that the property shall be sold either in one lot or in separate parcels, the parties to the suit cannot by agreement disregard the order, and make a valid sale in any other manner.[7] A subsequent party in interest has a right to insist upon a strict compliance with the decree and the statute in the manner of the sale.[8]

The fact that several parcels mortgaged together had previously been held, used, and conveyed together as one farm, is a sufficient reason for selling the whole in one parcel;[9] and on the other hand, the fact that separate parcels have previously been held and used by themselves, and are evidently capable of being so used to advantage in the future, affords a presumption that they should be sold separately.[10]

[1] Waldo *v.* Williams, 3 Ill. (2 Scam.) 470; White *v.* Watts, 18 Iowa, 74; Benton *v.* Wood, 17 Ind. 260. See, also, Lay *v.* Gibbons, 14 Iowa, 377.

[2] Bank of Ogdensburg *v.* Arnold, 5 Paige (N. Y.), 38.

[3] 3 Wait's Prac. 376.

[4] Ryerson *v.* Boorman, 7 N. J. Eq. (3 Halst.) 167, 640.

[5] Blazey *v.* Delius, 74 Ill. 299.

[6] Blazey *v.* Delius, *supra.*

[7] Babcock *v.* Perry, 8 Wis. 277.

[8] Farmers' & Millers' Bank *v.* Luther, 14 Wis. 96.

[9] Anderson *v.* Austin, 34 Barb. (N. Y.) 319. See Whitbeck *v.* Rowe, 25 How. (N. Y.) Pr. 403.

[10] Whitbeck *v.* Rowe, 25 How. (N. Y.) Pr. 403.

1619. Sale on subsequent default. — The statutes of several states provide that when a portion only of the mortgage debt is due a portion of the mortgaged premises may be sold in satisfaction of such part, and that the judgment may stand as security for any subsequent default; and that upon the happening of such default the court shall order a second sale to satisfy such default; and that the same proceeding may be had as often as a default shall happen. The subsequent sale is made by order of court upon the plaintiff's petition, which should state all the essential facts upon which the order is to be founded. Notice of the application must be given to all persons interested who have appeared in the action. The order for sale is issued as in other cases, and the sale is made in the same manner.

If part of the debt be not due, the court should decree a sale of so much of the premises as will be sufficient to pay the amount due, and a further order of sale should be obtained on the maturing of the unpaid instalment of the debt. If the premises cannot be divided, the decree should provide for the payment of the money to the mortgagee in extinction of the debt, unless some safe course more beneficial to the mortgagor exists.[1] Generally, a sale of the whole estate, when there is no order for a sale in parcels for an instalment due before the principal amount, exhausts the remedy of the creditor, and passes a clear title to the purchaser.[2]

4. *Order of Sale.*

1620. When the mortgagor has made successive sales of distinct parcels of the mortgaged land to different persons, it is generally regarded as only equitable that the mortgagee, when he afterwards proceeds to foreclose his mortgage, should be required to sell in the first place such part, if any, as the mortgagor still retains, and then the parts that have been sold in the same subdivisions, but beginning with the parcel last sold by the mortgagor.[3] This rule rests upon the reason that where the mortgagor sells a part of the mortgaged premises without reference to the incumbrance, it is right between him and the purchaser that the part still held by the mortgagor shall first be applied to the pay-

[1] Walker *v.* Hallett, 1 Ala. 379; Levert *v.* Redwood, 9 Port. (Ala.) 79; Knapp *v.* Burnham, 11 Paige (N. Y.), 330.

[2] Poweshiek Co. *v.* Dennison, 36 Iowa, 244, and cases there cited.

[3] See Contribution to redeem, §§ 1089–1092.

ment of the debt;[1] and this part is regarded as equitably charged with the payment of the debt; therefore, when he afterwards sells another portion of that remaining in his possession, the second purchaser simply steps into the shoes of the mortgagor as regards this land, and takes it charged with the payment of the mortgage debt as between him and the purchaser of the first lot; but still as between the second purchaser and the mortgagor it is equitable that the land still held by the latter should pay the incumbrance. In this manner the equities apply to successive purchasers. This order of equities proceeds upon the supposition that each subsequent purchaser has actual or constructive notice, by the record of the deed or otherwise, of each prior conveyance by the mortgagor of portions of the premises.[2]

1621. Rule of inverse order. — These equitable considerations have led to the adoption of the rule that the mortgagee in such case shall sell the mortgaged land in the inverse order of its alienation by the mortgagor; and it will be seen by the cases cited that this rule has been generally adopted.[3]

[1] Hoy *v.* Bramhall, 19 N. J. Eq. 563; Gaskill *v.* Sine, 13 N. J. Eq. 400; Messervey *v.* Barelli, 2 Hill (S. C.) Ch. 567; Lock *v.* Fulford, 52 Ill. 166. This equity is recognized even where it is held that there is no equity of one purchaser over another. Blight *v.* Banks, 6 Mon. (Ky.) 197; Dickey *v.* Thompson, 8 B. Mon. (Ky.) 314. See, also, Mevey's Appeal, 4 Pa. St. 80; Hodgdon *v.* Naglee, 5 Watts & S. (Pa.) 218; Blackledge *v.* Nelson, 2 Dev. Eq. (N. C.) 65.

[2] For cases giving the reason for the rule, see Weatherby *v.* Slack, 16 N. J. Eq. 491; Wikoff *v.* Davis, 4 N. J. Eq. (3 Green) 224; Ingalls *v.* Morgan, 10 N. Y. 178; Lock *v.* Fulford, 52 Ill. 166; Matteson *v.* Thomas, 41 Ill. 110; Iglehart *v.* Crane, 42 Ill. 261; Tompkins *v.* Wiltberger, 56 Ill. 385; Stanly *v.* Stocks, 1 Dev. (N. C.) Eq. 314.

[3] This rule is adopted in, —

Alabama: Mobile, &c. Co. *v.* Huder, 35 Ala. 713. **Florida**: Ritch *v.* Eichelberger, 13 Fla. 169. **Georgia**: Cumming *v.* Cumming, 3 Ga. 460. **Illinois**: Niles *v.* Harmon, 80 Ill. 396; Tompkins *v.* Wiltberger, 56 Ill. 385; Iglehart *v.* Crane, 42 Ill. 261; Sumner *v.* Waugh, 56 Ill. 531; Dodds *v.* Snyder, 44 Ill. 53; Lock *v.* Fulford, 52 Ill. 166; Matteson *v.* Thomas, 41 Ill. 110; Marshall *v.* Moore, 36 Ill. 321. **Indiana**: McCullum *v.* Turpie, 32 Ind. 146; Day *v.* Patterson, 18 Ind. 114; Aiken *v.* Bruen, 21 Ind. 137. See, also, Cissna *v.* Haines, 18 Ind. 496; Williams *v.* Perry, 20 Ind. 437. **Maine**: Sheperd *v.* Adams, 32 Me. 63; Holden *v.* Pike, 24 Me. 427. **Massachusetts**: George *v.* Wood, 9 Allen, 80; George *v.* Kent, 7 Allen, 16; Kilborn *v.* Robbins, 8 Allen, 466; Chase *v.* Woodbury, 6 Cush. 143; Allen *v.* Clark, 17 Pick. 47. See Parkman *v.* Welch, 19 Pick. 231; Beard *v.* Fitzgerald, 105 Mass. 134. **Michigan**: Sager *v.* Tupper, 35 Mich. 134; Cooper *v.* Bigly, 13 Mich. 463; Mason *v.* Payne, Walk. 459; McKinney *v.* Miller, 19 Mich. 142; Ireland *v.* Woolman, 15 Mich. 253; Briggs *v.* Kaufman, 2 Mich. N. P. 160. **Minnesota**: Johnson *v.* Williams, 4 Minn. 260, 268. **New Hampshire**: Brown *v.* Simons, 44 N. H. 475. **New Jersey**: Hill *v.* McCarter, 27 N. J. Eq. 41; Mount *v.* Potts, 23 N. J. Eq. 188; Shannon *v.* Marselis, 1 N. J. Eq. (Sax.) 413; Britton *v.* Updike, 3 N. J.

For the reason that this rule, whether established by statute or by decisions of state courts, is a rule of property, the courts of the United States sitting in any state in which this rule is established will follow it.[1]

This rule and the question of its adoption has been very frequently before the American courts; and the principle of the rule has also been frequently stated by the English and Irish courts. "If afterwards the mortgagor," says Lord Plunket, "sells a portion of his equity of redemption for valuable or good consideration, the entire residue undisposed of by him is applicable, in the first instance, to the discharge of the mortgage, and in ease of the *bonâ fide* purchaser; and it is contrary to any principle of justice to say that a person afterward purchasing from that mortgagor shall be in a better situation than the mortgagor himself in respect to any of his rights."[2] In the same case when it

Eq. (2 Green) 125; Wikoff *v.* Davis, 4 N. J. Eq. (3 Green) 224; Winters *v.* Henderson, 6 N. J. Eq. (2 Halst.) 31; Gaskill *v.* Sine, 13 N. J. Eq. (2 Beas.) 400; Weatherby *v.* Slack, 16 N. J. Eq. 491; Keene *v.* Munn, 16 N. J. Eq. 398; Mut. Life Ins. Co. of N. Y. *v.* Boughrum, 24 N. J. Eq. 44; Mount *v.* Potts, 23 N. J. Eq. 188. **New York**: Clowes *v.* Dickinson, 5 Johns. Ch. 240; James *v.* Hubbard, 1 Paige, 234; Jenkins *v.* Freyer, 4 Paige, 53; Guion *v.* Knapp, 6 Paige, 35; Patty *v.* Pease, 8 Paige, 277; Skeel *v.* Spraker, 8 Paige, 182; Kellogg *v.* Rand, 11 Paige, 59; Ferguson *v.* Kimball, 3 Barb. Ch. 616; Weaver *v.* Toogood, 1 Barb. 238; Howard Ins. Co. *v.* Halsey, 4 Sandf. 565; Rathbone *v.* Clark, 9 Paige, 649; Stuyvesant *v.* Hall, 2 Barb. Ch. 151; Farmers' Loan & Trust Co. *v.* Maltby, 8 Paige, 361; La Farge Fire Ins. Co. *v.* Bell, 22 Barb. 54; *Ex parte* Merriam, 4 Den. 254; McDonald *v.* Whitney, 2 N. Y. Weekly Dig. 529; Crafts *v.* Aspinwall, 2 N. Y. 289; Howard Ins. Co. *v.* Halsey, 8 N. Y. 271. **Ohio**: Com. Bk. of Lake Erie *v.* W. R. Bank, 11 Ohio, 444; Cary *v.* Folsom, 14 Ohio, 365. But see Green *v.* Ramage, 18 Ohio, 428. **Pennsylvania**: The doctrine of contribution *pro rata* adopted in the earlier decisions in Pennsylvania. Nailer *v.* Stanley, 10 S. & R. 450; Presbyterian Corporation *v.* Wallace, 3 Rawle, 109. Donley *v.* Hays, 17 S. & R. 400, has been overruled in the later case of Cowden's Estate, 1 Pa. St. 267. See Carpenter *v.* Koons, 20 Pa. St. 222. **South Carolina**: Norton *v.* Lewis, 3 S. C. 25; Stoney *v.* Shultz, 1 Hill, 465; Meng *v.* Houser, 13 Rich. Eq. 210. **Texas**: Miller *v.* Rogers, 49 Tex. 398; Rippetoe *v.* Dwyer, 49 Tex. 498. **Vermont**: Root *v.* Collins, 34 Vt. 173; Lyman *v.* Lyman, 32 Vt. 79. **Virginia**: Henkle *v.* Allstadt, 4 Gratt. 284; Jones *v.* Myrick, 8 Gratt. 179; Conrad *v.* Harrison, 3 Leigh, 532. **Wisconsin**: Worth *v.* Hill, 14 Wis. 559; Wisconsin *v.* Titus, 17 Wis. 241; Ogden *v.* Glidden, 9 Wis. 46; Aiken *v.* Milwaukee & St. Paul R. R. Co. 37 Ill. 469.

[1] Orvis *v.* Powell (Supreme Court, Oct. T. 1878), 8 Cent. L. J. 74.

[2] In Hartley *v.* O'Flaherty, Lloyd & Goold Cases temp. Plunket, 216. See, also, for illustrations of this rule Hamilton *v.* Royse, 2 Schoales & Lefroy, 326; Averall *v.* Wade, Lloyd & Goold, temp. Sugden, 252; Harbert's case, 3 Coke, 11.

Mr. Justice Story questioned the correctness of the doctrine, that in case of successive sales of property subject to mortgage, the parcel last sold is liable for the debt in exoneration of that sold next before it; or in other words, that the parcels are to be charged in the reverse order

was previously before the court, Lord Chancellor Hart said that as between the mortgagor "and the persons purchasing from him, the contributory fund must be so marshalled as to make his remaining property first applicable; and if that is insufficient, I think the portion of the last purchaser must be applicable before that of any prior purchaser."[1]

The rule applies where the mortgagor has conveyed the premises in different parcels, and the grantees of these parcels again convey them in parcels, the grantees of the latter parcels being liable under this rule for the share of the mortgage chargeable upon their grantor's share of the premises, in the inverse order of conveyance to them.[2]

The rule will not, however, be applied in any case where its application would work injustice.[3]

1622. This rule is generally held to apply to subsequent mortgages of the equity of redemption as well as to absolute conveyances of it.[4] In New Jersey, however, it is held that as between the holders of mortgages of different and distinct parts of the incumbered land, each is bound to bear his proportion according to the value of the parts; and that the rule does not apply as between them.[5] The entire premises may be decreed to be sold, and the proceeds applied to the payment of the mortgages and other incumbrances, according to their priority, although sufficient to satisfy the first mortgage be obtained by a sale of part of the premises.[6]

of the transfers: the parcels last sold being first charged to their full value, and so backwards, until the debt is fully paid. He says: "But there seems great reason to doubt whether this last position is maintainable upon principle; for as between the subsequent purchasers or incumbrancers, each trusting to his own security upon the separate estate mortgaged to him, it is difficult to perceive that either has, in consequence thereof, any superiority of right or equity over the other; on the contrary, there seems strong ground to contend that the original incumbrance or lien ought to be borne ratably between them, according to the relative value of the estates." 2 Story's Eq. Juris. § 1233.

He claimed the authority of the English cases in support of this view. The question was considered in Barnes *v.* Racster, 1 Younge & C. Ch. 401, where the Vice-Chancellor, Sir L. Shadwell, in a case where there were several successive mortgages, instead of throwing the whole burden of the prior incumbrances upon the land conveyed to the last mortgagee, made it a ratable charge on the whole estate.

[1] Beatty, 61, 79.

[2] Hiles *v.* Coult, 30 N. J. Eq. —; 18 Am. L. Reg. (N. Y.) 203.

[3] Hill *v.* McCarter, 27 N. J. Eq. 41.

[4] Dodds *v.* Snyder, 44 Ill. 53; Steere *v.* Childs, 15 Hun (N. Y.), 511.

[5] Pancoast *v.* Duval, 26 N. J. Eq. 445.

[6] Ely *v.* Perrine, 2 N. J. Eq. (1 Green) 396.

When, however, a portion of the mortgaged premises has been mortgaged again, and subsequently the balance has been conveyed absolutely, inasmuch as the mortgage is only a qualified alienation, and the mortgagor still has an interest in the property, that part is first sold; and if there is any surplus beyond the amount required to satisfy the second mortgage, that is, if the equity of redemption is of any value, that is applied in payment of the first mortgage before resorting to the portion of the premises conveyed absolutely.[1] But after this if the property is not of sufficient value to pay both mortgages, as between the second mortgagee and the subsequent purchaser, it would seem that in the distribution of proceeds the former should be entitled to any surplus remaining after the payment of the first mortgage.

If the mortgagor alienate a portion of the mortgaged premises and afterwards mortgages another portion, the second mortgagee cannot claim that the part alienated before the giving of his mortgage shall be first sold; but the rule of inverse order of alienation will apply against him.[2]

1623. When portions of the property have been sold under judgment, those portions stand in the order of sale in a foreclosure suit as of the times when the judgments respectively become liens, and not as of the times when the conveyances under such sales were executed by the sheriff.[3] In Pennsylvania, however, it is held that the rule does not apply at all to sales under judgments; the purchaser at such sales having no claim upon the mortgagor, or any one else, to pay off the mortgage for their relief.[4]

1624. The record of a subsequent deed is not, however, notice to the prior mortgagee. He is not required to search the records from time to time to see whether other incumbrances have been put upon it.[5] A distinct and actual notice is necessary

[1] Kellogg *v.* Rand, 11 Paige (N. Y.), 59.

[2] Sager *v.* Tupper, 35 Mich. 134.

[3] Woods *v.* Spalding, 45 Barb. (N. Y.) 602.

[4] Carpenter *v.* Koons, 20 Pa. St. 222.

[5] Greswold *v.* Marshan, 2 Ch. Cas. 170; Cheesebrough *v.* Millard, 1 Johns. (N. Y.) Ch. 409; Stuyvesant *v.* Home, 1 Sandf. (N. Y.) Ch. 419; Howard Ins. Co. *v.* Halsey, 8 N. Y. 271; Shannon *v.* Marselis, 1 N. J. Eq. (Sax.) 413; Birnie *v.* Main, 29 Ark. 591; James *v.* Brown, 11 Mich. 25; Carter *v.* Neal, 24 Ga. 346; Taylor *v.* Maris, 5 Rawle (Pa.), 51; Ritch *v.* Eichelberger, 13 Fla. 169; Brown *v.* Simons, 44 N. H. 475; Lyman *v.* Lyman, 32 Vt. 79; Chase *v.* Woodbury, 6 Cush. 143.

In James *v.* Brown, *supra*, the court say: "It is the duty of a subsequent mortgagee, if he intends to claim any rights

to affect the rights of the mortgagee in this respect, and oblige him to foreclose with reference to the subsequent order of alienation. The record is not even constructive notice to him. Only subsequent purchasers and incumbrancers are within the purview of the registry laws. A person interested in the equity wishing to protect himself must bring home to the mortgagee actual notice of his equities.[1] If he is not a party to the foreclosure suit, and has no opportunity to present his claims there, he may file a bill against the mortgagee and the other subsequent purchasers, and obtain a stay of the sale until the respective equities can be adjusted. After a sale it is too late to assert his rights.

In like manner when there has been a partition of land, of which an undivided half was mortgaged, that part of the land set off to the mortgagor should be first sold; and if the officer, having been offered the whole amount of the debt for that part, proceeds to sell an undivided half of the whole, the sale will be set aside.[2] And so if a portion of the mortgaged land has been sold to pay the mortgagor's debts after his decease, the residue of the premises remaining in his heirs must be first resorted to for the satisfaction of the mortgage.[3]

1625. But this rule does not apply in cases where the parties have by agreement in their deed charged the mortgage upon the land in a different manner; as where by the terms of sale of a part of the premises the mortgage is made a common charge upon the whole premises, or the part conveyed is subjected to a proportionate part of the incumbrance.[4] In such cases, if there

through the first mortgage, or that may affect the rights of the mortgagee under it, to give the holder thereof notice of his mortgage, that the first mortgagee may act with his own understandingly. If he does not, and the first mortgagee does with his mortgage what it was lawful for him to do before the second mortgage was given, without knowledge of its existence, the injury is the result of the second mortgagee's negligence in not giving notice."

[1] Matteson *v.* Thomas, 41 Ill. 110; Hoy *v.* Bramhall, 19 N. J. Eq. 563; Blair *v.* Ward, 2 Stockt. (N. J.) 119; King *v.* McVickar, 3 Sandf. (N. Y.) Ch. 192; Cheesebrough *v.* Millard, 1 Johns. (N. Y.) Ch. 414; Gouverneur *v.* Lynch, 2 Paige (N. Y.), 300.

[2] Quaw *v.* Lameraux, 36 Wis. 626.

[3] Moore *v.* Chandler, 59 Ill. 466.

[4] Mutual Life Ins. Co. of N. Y. *v.* Boughrum, 24 N. J. Eq. 44; Pancoast *v.* Duval, 26 N. J. Eq. 445; Hoy *v.* Bramhall, 19 N. J. Eq. 563. In this case the conveyance was made, "subject, however, to the payment by said grantee of all existing liens upon said premises." The effect of this was to subject the lands conveyed to the payment of a proportionate part of the mortgage. The court say, it may be that the language is not sufficient to create a covenant on which a strictly personal liability may be based; but it clearly

be no specific agreement as to the proportion which each part is to bear, contribution must be made according to the relative value of each part.

When a purchaser of a part of the premises has agreed to assume the whole or a part of the mortgage debt as a part of the consideration he pays for the land, and subsequently sells it to another, this grantee having notice of such agreement stands in no better position than the first purchaser as regards any equity against the mortgagor.[1] And so where the whole of a tract of land was subject to a mortgage and a portion of it was conveyed, and afterwards the remainder was conveyed to the same purchaser subject to the payment of the mortgage, and the purchaser subsequently made mortgages of the different parcels, upon a foreclosure of the first named mortgage the assumption of this mortgage in the deed of the second parcel was regarded as operating between the parties as an agreement that the land therein named should be the primary fund for the payment of the debt, and that the mortgage should be enforced upon that land in the first instance, and upon the lot first conveyed in the case of a deficiency; and therefore it was held that the order of sale was not determined by the order of alienation by the purchaser.[2]

1626. Contribution according to value. — The rule that the sale shall take place in the inverse order of alienation is rejected in the states of Iowa[3] and Kentucky.[4] Instead of this they have adopted the rule that the several owners shall contribute according to the value of their portions of the property. If the purchasers have made improvements upon their lots, the enhanced

makes the part conveyed subject to its proper proportion of the incumbrances, so as to relieve to that extent that part retained by the mortgagor, and that therefore both parts must contribute according to their relative values. To same effect see Briscoe *v.* Power, 47 Ill. 447; Halsey *v.* Reed, 9 Paige (N. Y.), 446; Torrey *v.* Bank of Orleans, Ib. 649; Warren *v.* Boynton, 2 Barb. (N. Y.) 13.

[1] Engle *v.* Haines, 5 N. J. Eq. (1 Halst.) 186; Ross *v.* Haines, Ib. 632.

[2] Steere *v.* Childs, 15 Hun (N. Y.), 511.

[3] Bates *v.* Ruddick, 2 Iowa, 423; Massie *v.* Wilson, 16 Iowa, 391 Barrey *v.* Myers, 28 Iowa, 427.

[4] Poston *v.* Eubank, 3 J. J. Marsh. 44; Campbell *v.* Johnston, 4 Dana, 182; Dickey *v.* Thompson, 8 B. Mon. 313. In the latter case this rule is discussed at length, and the earlier decisions approved and affirmed, though contrary to the later decisons in other states. It was considered more equitable that the burden should be equalized according to the value of the different parcels, than that the whole should be thrown upon the last purchaser of the last lot. See, also, Hunt *v.* McConnell, 1 T. B. Mon. (Ky.) 219.

As to **North Carolina**, see Stanly *v.* Stocks, 1 Dev. Eq. 314, where the question was raised.

value resulting from the improvements is not included in the valuation of the property under this rule. In these states, therefore, the mortgaged lands may be sold under the decree of foreclosure, without reference to the mortgagee's knowledge that they have been sold in parcels at different times to different persons.

1627. Valuation to be made as of what time. — When contribution is to be made under the rule adopted by these states, that the proportion is to be determined by the relative value of the different parcels, whether the valuation should be taken at the date of the mortgage, at the time of foreclosure, or at the date of the several purchases, is not perhaps very material, as the fluctuation of price would generally be about equal for the different parcels.[1] The practice in different courts has not been uniform. Nor indeed has the practice of the same court always been the same in this regard.

When the mortgaged premises have been conveyed in distinct parcels, and the subsequent grantees or mortgagees of the parts are bound to contribute in proportion to the value of their parts, they are entitled to have the premises sold in parcels, provided it can be done without prejudice to the rights of the mortgagee.[2]

1628. As a general rule if a mortgagee has other security for his demand, and another creditor has a lien upon one of the funds only, the former must resort in the first place to that security upon which no one other than his debtor has any claim.[3] This rule is subject to the qualification that it shall not be applied

[1] Valuation at the date of the mortgage was adopted in Stevens *v.* Cooper, 1 Johns. (N. Y.) Ch. 425. Valuation at the date of the mortgage was fixed upon in Morrison *v.* Beckwith, 4 Mon. (Ky.) 76; but in Burk *v.* Chrisman, 3 B. Mon. 50, the same court sustained a valuation at the date of the several purchases; and in Dickey *v.* Thompson, 8 B. Mon. (Ky.) 312, seemed to approve of a valuation at the time of foreclosure.

[2] Pancoast *v.* Duval, 26 N. J. Eq. 445; Stelle *v.* Andrews, 19 N. J. Eq. 409.

[3] Story's Eq. Juris. §§ 559, 560. This principle is illustrated by Lord Hardwicke in Lancy *v.* Duke and Duchess of Athol, 2 Atk. 444, 446: "Suppose a person who has two real estates mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first; the court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee." See, also, Wright *v.* Nutt, 1 H. Bl. 150; Swift *v.* Conboy, 12 Iowa, 444; Ramsey's Appeal, 2 Watts, 228; Fowler *v.* Barksdale, Harper's Eq. (S. C.) 164; Terry *v.* Rosell, 32 Ark. 478; Warwick *v.* Ely, 29 N. J. Eq. 82; Scott *v.* Webster, 44 Wis. 185; 6 Reporter, 287.

where it would work any injustice to the prior creditor,[1] or to any other person interested in the securities; as where the mortgagee's right to satisfy his claim out of both funds would be in any way impaired; or where there is any doubt of the sufficiency of the fund upon which the junior creditor has no claim; or where the prior creditor is not willing to run the risk of obtaining satisfaction out of that fund; or where that fund is of a dubious character, or is one which may involve him in litigation to realize. "But it is the ordinary case," says Lord Eldon, "to say, a person having two funds shall not by his election disappoint the party having only one fund and equity, to satisfy both, will throw him who has two funds, upon that which can be affected by him only, to the intent that the only fund to which the other has access may remain clear to him."[2]

In accordance with these restrictions of the rule, where a creditor was secured by a mortgage of land and slaves, and the land was afterwards sold by the mortgagor, and one of the slaves was sold by the sheriff under executions issued part before and part after the mortgage, though the sum received by the sheriff was sufficient to satisfy the senior executions and the balance of the mortgage debt, the mortgagee was not compelled to resort to this fund because he might thereby incur the expense and risk of litigation; but was allowed to foreclose the mortgage upon the land to satisfy his demand.[3] The mortgagee might lose the very benefit sought by having a double security, if he were compelled to incur the risk of delay or loss by being referred for his payment to security he deemed the more uncertain. The subsequent purchaser of the mortgaged property takes it with full knowledge of the incumbrance, and it is more equitable that he should be obliged to pay the mortgage debt and be subrogated to the other security of the mortgagee than that the latter should be prejudiced.

1629. So also when two persons have mortgages upon the same piece of property, which is insufficient to satisfy both, and one of them has a lien for his debt upon other property, equity requires that he shall exhaust the latter before resorting to the mortgaged property.[4] In like manner when two persons, to se-

[1] Slater *v.* Breese, 36 Mich. 77.

[2] Aldrich *v.* Cooper, 8 Ves. 382, 395; and see Averall *v.* Wade, Lloyd & Goold temp. Sugden, 252, and notes.

[3] Walker *v.* Covar, 2 S. C. 16.

[4] Trowbridge *v.* Harleston, Walk. Ch. (Mich.) 185; Sibley *v.* Baker, 23 Mich. 312.

cure the debt of one of them, have jointly mortgaged three parcels of land, one of which they own jointly, while each of them owns one of the others individually, the decree should order the sale, first of the portion of the mortgagor equitably bound to pay the debt, and next of the joint parcel.[1]

And where a principal debtor and his surety have both mortgaged their lands to secure a debt, the lands of the principal debtor are to be first sold, and those of the surety only for the deficiency.[2]

1630. If one holds two mortgages on different parcels of land to secure the same debt in the absence of any equities in subsequent purchasers, he may foreclose either one without the other; but if there are subsequent purchasers, the equitable rules already spoken of must be observed;[3] and if the mortgages cover in part the same land, and are both foreclosed together, the land included in the first mortgage should be exhausted before recourse is had to the second.[4]

1631. If the mortgagee, having notice of successive alienations of parts of the mortgaged premises, has released a part which is previously liable for the payment of the debt, he cannot charge the other portions of the premises with the payment of it without first deducting the value of the part released.[5] If that value equals the entire debt, he must bear the loss, as he cannot then resort to the lot first sold; if it is equal to a part of the debt only, he may resort to the lot sold for the deficiency. But if the mortgagor had no title to the lot released, or it could in any way

[1] Ogden *v.* Glidden, 9 Wis. 46.

[2] Drake *v.* Bray, Nixon's Dig. 614.

[3] Burpee *v.* Parker, 24 Vt. 567.

[4] Raun *v.* Reynolds, 11 Cal. 14.

[5] See § 731; Reilly *v.* Mayer, 1 Beas. (N. J.) 55; Van Orden *v.* Johnson, 14 N. J. Eq. 376; Mickle *v.* Rambo, Saxton (N. J.), 501; Shannon *v.* Marselis, Ib. 413; Mount *v.* Potts, 23 N. J. Eq. 188; Hoy *v.* Bramhall, 19 N. J. Eq. 563; Blair *v.* Ward, 2 Stockt. (N. J.) 119; Gaskill *v.* Sine, 13 N. J. Eq. 400; Guion *v.* Knapp, 6 Paige (N. Y.), 35; Stevens *v.* Cooper, 1 Johns. (N. Y.) Ch. 425; Stuyvesant *v.* Hone, 1 Sandf. (N. Y.) Ch. 419; Patty *v.* Pease, 8 Paige (N. Y.), 277; Duester *v.* McCamus, 14 Wis. 307; Birnie *v.* Main, 29 Ark. 591; Parkman *v.* Welch, 19 Pick. (Mass.) 231; George *v.* Wood, 9 Allen (Mass.), 80; Taylor *v.* Maris, 5 Rawle (Pa.), 51; James *v.* Brown, 11 Mich. 25; Harrison *v.* Guerin, 27 N. J. Eq. 219; Miller *v.* Rogers, 49 Tex. 398.

In Iglehart *v.* Crane, 42 Ill. 261, the court say: "From this rule, as to the order in which mortgaged premises are to be charged, it follows as a corollary, that, if the mortgagee with actual notice of the facts releases from the mortgage that portion of the premises primarily liable, he thereby releases *pro tanto* the portion secondarily liable. When the mortgage is sought to be enforced against the owner of the latter, he can claim an abatement of his liability to the extent of the value of that portion which should have made the primary fund."

be shown that the owners of the other lots were not prejudiced by the release, this rule would not apply.[1] In such cases, in order to ascertain the value of the different parts of the land and the amount due on the mortgage, a reference is ordered.[2] A mortgagee, however, does not, by a partial release without consideration, impair his right to enforce his mortgage against the remainder of the property, unless he had actual notice of the previous transfer of the remainder or of some portion of it by the mortgagor. The same rule about notice already stated applies equally here. A reference in his release to a conveyance of another part of the land by the mortgagor is, however, constructive notice of it.[3]

If the mortgagee having also personal security for his demand by his fault and negligence loses this, a purchaser of the land may compel him to deduct from the mortgage debt the value of the security lost, so that the mortgage can be foreclosed only for the balance.[4]

1632. Homestead. — The fact that the mortgage covers a homestead and also other property, which is subject to a subsequent judgment lien, gives the debtor no right to have the latter property first applied to the payment of the mortgage debt, so that he may save his homestead.[5] The fact that part of the property is a homestead does not change the equity rule that a party having security on two funds shall first exhaust his remedy upon the fund he alone is secured upon, when there is another party having security on the other.[6] In a case where the mortgage embraced the homestead and a business lot, and the homestead had been sold to satisfy the mortgage debt and there were judgment liens upon the business lot, the court declined to set aside the foreclosure sale, Chief Justice Dixon saying: "However just and reasonable it might be for the court to compel a sale of the business lot first, and thus save the homestead, if that were the only question, yet we think the mortgagor's equity to hold his homestead fully countervailed by the equities of his creditors, who must look to the business lot for their satisfaction, and who have no lien upon the homestead. Until the legislature shall have de-

[1] Taylor *v.* Short, 27 Iowa, 361.

[2] Gaskill *v.* Sine, 13 N. J. Eq. 400.

[3] Booth *v.* Swezey, 8 N. Y. 276.

[4] Moody *v.* Haselden, 1 S. C. 129.

[5] §§ **731, 1286**, where the reasons for the rule are stated; White *v.* Polleys, 20 Wis. 503; Searle *v.* Chapman, 121 Mass. 19; Chapman *v.* Lester, 12 Kans. 592. *Contra*, in **California**, McLaughlin *v.* Hart, 46 Cal. 639. See Dodds *v.* Snyder 44 Ill. 53.

[6] *In re* Santhoff & Olson, 7 Biss. 167.

cleared the obligation to preserve the homestead superior to that of paying one's honest debts, we must hold the equity of the creditor at least equal to that of the debtor in cases like this."[1]

4. *Conduct of Sale.*

1633. The officer conducting the sale should be present. The sale is made by public auction to the highest bidder, unless otherwise ordered by the court. It is conducted by the officer designated by the decree or by statute,[2] though he may employ an auctioneer to act for him in his presence.[3] His presence is required in order that the parties interested may have the benefit of the discretion and judgment which he should exercise for their benefit, in order to obtain a fair price for the property. There is often special occasion for the exercise of a reasonable discretion in the matter of adjournments; for unexpected occurrences may at the last moment threaten a sacrifice of the property, unless he exercises his right to adjourn the sale to another day. This is one of the duties which he cannot properly delegate to another. If a sale be made in the absence of the sheriff, whose duty it was to conduct it by his agent or bailiff informally appointed, and the sheriff executes a deed to the purchaser, the deed will pass the title, and will be good in a collateral proceeding as the act of an officer *de facto*, but will be set aside on a direct application made in the course of the same proceeding.[4] It has even been held that a sale by one loan commissioner in the absence of his associate is irregular, though the deed be executed by both.[5]

The property must be offered to the highest bidder, and bids received so long as they are offered; and after waiting a reasonable time for another, and none being made, it should be struck off to the highest bidder.[6]

1634. Adjournment.[7] — If at the time and place of sale there be no bidder present other than the mortgagee or his attorney, it is the duty of the auctioneer or officer making the sale to adjourn

[1] Jones *v.* Dow, 18 Wis. 241.

[2] Heyer *v.* Deaves, 2 Johns. (N. Y.) Ch. 154.

[3] Blossom *v.* R. R. Co. 3 Wall. 205.

[4] Meyer *v.* Patterson, 28 N. J. Eq. 249; S. C. *Sub. nom.* Meyer *v.* Bishop, 27 Ib. 141.

[5] York *v.* Allen, 30 N. Y. 104; Olmsted *v.* Elder, 5 N. Y. (1 Seld.) 144; Pell *v.* Ulmar, 21 Barb. (N. Y.) 500. See, however, King *v.* Stow, 6 Johns. (N. Y.) Ch. 323.

[6] Bicknell *v.* Byrnes, 23 How. (N. Y.) Pr. 486; and see May *v.* May, 11 Paige (N. Y.), 201.

[7] See chapter xl, division 10.

it.[1] The application for an adjournment usually comes from some one or more of the parties interested; but it may be the duty of the officer to adjourn the sale without the request of any one, and even against the wish of a party in interest.[2] The officer making the sale may properly adjourn it by direction of the complainant's solicitor, for the purpose of enabling the mortgagors to pay the debt; and he may make several short adjournments for this purpose, and finally, upon payment, may discontinue the sale altogether.[3] He has a discretionary power in this respect; but if he exercises it in an arbitrary or unreasonable manner, the sale will be set aside and a resale ordered.[4] The adjourned day of sale should be announced at the time of the adjournment,[5] but if this cannot be done on account of an injunction, a general adjournment may be made, and the day advertised afterwards.[6] If the first day is by mistake set upon a Sunday, the postponement may be effected by an advertisement before the day arrives.[7] If the day fixed for sale be afterwards appointed a legal holiday, an adjournment should be made. In such case the advertisement is not rendered invalid.[8]

If the day of sale be fixed in the announcement of the adjournment, and other notice of the adjourned sale name a different day, the sale will be irregular.[9]

The adjournment may be made to a different place than that named in the original notice, unless the place be fixed by law or by the decree;[10] though a sale adjourned to a place different from that named in the decree has been confirmed.[11]

It is the better and safer practice to advertise the adjourned sale, though this is not always essential to the legality of the sale.[12] If an adjournment be made at the request of the owner of

[1] Strong *v.* Catton, 1 Wis. 471.

[2] Astor *v.* Romayne, 1 Johns. (N. Y.) Ch. 310; McGown *v.* Sandford, 9 Paige (N. Y.), 2 290. See, also, Russell *v.* Richards, 11 Me. 371; Tinkom *v.* Purdy, 5 Johns. (N. Y.) 345; Richards *v.* Holmes, 18 How. 143, 147; Ward *v.* James, 8 Hun (N. Y.), 526.

[3] Blossom *v.* R. Co. 3 Wall. 196.

[4] Breese *v.* Busby, 13 How. (N. Y.) Pr. 485.

[5] La Farge *v.* Van Wagenen, 14 How. (N. Y.) Pr. 54.

[6] La Farge *v.* Van Wagenen, 14 How. (N. Y.) Pr. 54.

[7] Westgate *v.* Handlin, 7 How. (N. Y.) Pr. 372.

[8] White *v.* Zust, 28 N. J. Eq. 107.

[9] Miller *v.* Hull, 4 Den. (N. Y.) 104.

[10] See Richards *v.* Holmes, 18 How. 144, 147.

[11] Farmers' Bank of Md. *v.* Clarke, 28 Md. 145.

[12] Stearns *v.* Welsh, 7 Hun (N. Y.), 676. This is by rule of court in New York.

the equity of redemption, under an agreement to allow commissions and expenses of the postponed sale, these are a personal claim against him, and cannot be taken out of the proceeds of the sale to the detriment of any one else.[1]

1635. A sale may be kept open so as to enable the mortgagee or officer making the sale to put up the property again, in case the person bidding it off fails to make good his bid. Notifying the persons brought together by the published notice that the sale would thus be held open is all that is requisite; and a sale made in accordance with such notification will not be set aside at the instance of the first bidder, in the absence of equities, and merely for the reason that it was made after the time when it was advertised to take place.[2]

1636. The objection to the mortgagee's buying at the sale, when the mortgaged property is sold under judicial process, has much less force than it has when the sale is made under a power;[3] for the judicial sale is made by an officer designated by the court or by statute for the purpose, and the mortgagee for whose benefit it is made has not the actual control and management of the sale, as he has in case of a sale under a power. Accordingly in those states in which the sale under a power is taken out of the hands of the mortgagee and placed under the direction of a sheriff or other officer, the restriction against the mortgagee's buying is at the same time generally removed.[4]

Where the authority is not given to the mortgagee by statute or by judicial construction to buy at a sale under decree of court upon his own mortgage, it is sometimes provided in the decree that he may become a purchaser, and he may generally obtain leave to bid and purchase for himself.[5] It is generally for the interest of the mortgagor and others interested in the equity of redemption that he should have the right to buy, as it often happens that he will pay more for the property than any one else will pay; and it is often equally important to the mortgagee to have

[1] Neptune Ins. Co. *v.* Dorsey, 3 Md. Ch. 334.

[2] Isbell *v.* Kenyon, 33 Mich. 63; and see Baring *v.* Moore, 5 Paige (N. Y.), 48.

[3] See §§ 1876–1886.

[4] See § 1882.

[5] See Conger *v.* Ring, 11 Barb. (N. Y.) 356; Domville *v.* Berrington, 2 Y. & C. 724.

In New York, by rule of court, a provision is inserted in every decree for the sale of mortgaged premises, unless otherwise specially ordered, that the plaintiff may become the purchaser. Ten Eyck *v.* Craig, 62 N. Y. 406, 421, per Andrews, J.

this power, in order to prevent a sacrifice of his own interests.[1] But under the technical rule against his purchasing, no one not interested in the equity of redemption can take advantage of his purchasing;[2] and a person entitled to do so can only redeem.

A mortgagee who becomes a purchaser under a decree made upon his own complaint is not allowed to object to the title on the ground that persons in possession of the property without title were not made parties.[3] And even if there be a defect in the proceedings he is supposed to have full notice of it, though actual notice be not shown, and is not allowed to object on account of it.[4] The plaintiff's attorney may bid off the property, and the presumption is that he is making the purchase on his own account.[5]

When the mortgagee has the right to purchase, the mortgage debt is not extinguished for any unsatisfied balance, any more than it is in case a stranger becomes the purchaser.[6]

A purchaser of land subject to a mortgage which he has agreed to assume and pay is not precluded from purchasing at a sale under the mortgage within the rule against mortgagee's buying.[7]

5. *Confirmation of Sale.*

1637. Until confirmed by the court the sale is incomplete. The acceptance of the bid confers no title upon the purchaser, and not even any absolute right to have the purchase completed. He is nothing more than a preferred bidder, or proposer for the purchase, subject to the sanction of the court afterwards.[8] When this is given it relates back to the time of sale, and carries the title from the delivery of the deed. In a few states the foreclosure sale is made by a special writ of execution issued to the sheriff, and no report of the sale or confirmation of it is required. Such a sale is not purely a judicial sale, which is founded upon proceedings in equity, or upon an equitable action. In those

[1] See Holcomb *v.* Holcomb, 11 N. J. Eq. (3 Stockt.) 281.

[2] Edmondson *v.* Welsh, 27 Ala. 578.

[3] Ostrom *v.* McCann, 21 How. (N. Y.) Pr. 431.

[4] Boyd *v.* Ellis, 11 Iowa, 97.

[5] Chappell *v.* Dann, 21 Barb. (N. Y.) 17; and see Squier *v.* Norris, 1 Lans. (N. Y.) 282. But see §§ **1878, 1879.**

[6] Edwards *v.* Sanders, 6 S. C. 316.

[7] McNeill *v.* McNeill, 36 Ala. 109.

[8] 2 Daniel's Ch. 1454; Busey *v.* Hardin, 2 B. Mon. (Ky.) 407; Hay's Appeal, 51 Pa. St. 61; Young *v.* Keogh, 11 Ill. 642; Gowan *v.* Jones, 18 Miss. (10 S. & M.) 164; Mills *v.* Ralston, 10 Kans. 206; Allen *v.* Poole, 54 Miss. 323.

states in which foreclosure is obtained by a suit at law, as by *scire facias*, or by proceedings of a mixed nature, the sale is either ministerial or only *quasi* judicial.

The confirmation cures all mere irregularities in the proceedings to obtain the sale, and in the conduct of it; but does not make good a defect arising from want of jurisdiction of the court either of the case or of any party interested; and moreover, fraud, accident, or mistake, which will invalidate a contract generally, are grounds for setting aside the sale after confirmation.[1] If, however, the deed be executed and delivered without confirmation, long continued possession under it will make the title valid.[2]

It is no ground for refusing to order a resale that the purchaser before confirmation has conveyed the land, or that there is a surplus which is claimed by judgment creditors.[3] Neither the purchaser nor any one else has any right to regard the sale as concluded until it is confirmed.

Confirmation cannot be objected to on the ground that there would be no default in the payment of interest, if the sum retained as a bonus by the mortgagee at the time of the loan were applied to the payment of the legal interest upon the sum actually advanced. Usury cannot be taken advantage of in this way. "In determining whether there has been a default the court must be governed by the terms of the mortgage itself, irrespective of the question of usury. After a default thus made, a sale or its ratification can be prevented on this ground only by paying, or at least offering to pay, the sum actually loaned, with legal interest."[4] The usurious interest, when once paid, may be recovered back by an action at law, or in equity may be eliminated from the claim, upon the objection of others whose rights its allowance would injuriously affect.[5]

1638. It rests wholly in the discretion of the court whether the sale shall be confirmed or not, and this power will be exercised prudently and fairly in the interest of all concerned. The

[1] The statement in the text is fully illustrated by Mr. Justice Beckwith, in Dills *v.* Jasper, 33 Ill. 262; though Mr. Justice Caton, in the previous case of Jackson *v.* Warren, 32 Ill. 331, had asserted that a valid and binding contract is made when the hammer falls, and that the purchaser is entitled to a deed.

[2] Gowan *v.* Jones, 10 S. & M. (Miss.) 164.

[3] Wolcott *v.* Schenck, 23 How. (N. Y.) Pr. 385.

[4] Smith *v.* Myers, 41 Md. 425, 434.

[5] Ib.

court should be satisfied that the sale has been made in accordance with the requirements of the decree;[1] and especially that notice of the sale was given as required.[2] The confirmation is usually made by a formal order. It is the practice, generally, for the master or other officer who makes the sale to fully complete it so far as he can, by delivery of the deed and payment of the proceeds, before obtaining the order of court; but confirmation may be made in the first place of the sale, and afterwards of the deed. In England it is the practice to withhold the deed until the final order confirming the sale is made absolute.[3] One whose bid is not accepted by the officer, though it is the highest made, cannot insist upon a confirmation to himself of the sale.[4]

Confirmation of the sale can only be regularly made after notice of the motion for it to the parties adversely interested that they may show cause against it.[5] "Notice of the motion is given to the solicitors in the cause, and confirmation *nisi* is ordered by the court, — to become absolute in a time stated, unless cause is shown against it. Then, unless the purchaser calls for an investigation of the title by the master, it is the master's privilege and duty to draw the title for the purchaser, reciting in it the decree for sale, his approval of it, and the confirmation by the court of the sale, in the manner that such confirmation has been ordered."[6]

The usual order *nisi*, that the sale stand confirmed unless cause to the contrary be shown within a specified time, is a sufficient order of confirmation of a sale.[7] An appeal may be taken from such order.[8]

1639. A resale may be asked for by any one whose rights are injuriously affected by the sale, although he is not a party to the suit.[9] The circumstances of each particular case must be inquired into and acted upon.[10] The most general principle on which the courts act in setting aside the sale and ordering a new one is that

[1] Moore *v.* Titman, 33 Ill. 358.

[2] Perrien *v.* Fetters, 35 Mich. 233.

[3] *Ex parte* Minor, 11 Ves. 559.

[4] Blossom *v.* R. Co. 3 Wall. 196.

[5] Branch Bank at Mobile *v.* Hunt, 8 Ala. 876.

[6] Williamson *v.* Borry, 8 How, 495–546, per Wayne, Justice.

[7] Torrans *v.* Hicks, 32 Mich. 307.

[8] Detroit F. & M. Ins. Co. *v.* Renz, 33 Mich. 298; Koehler *v.* Ball, 2 Kas. 160.

[9] Kellogg *v.* Howell, 62 Barb. (N. Y.) 280.

[10] Lefevre *v.* Laraway, 22 Barb. (N. Y.) 167.

equity will not allow any unfairness or fraud, either on the part of the purchaser [1] or of any other person connected with the sale.[2]

The application may be made by motion to the court, at any time before the report of the sale has been confirmed, notice of which should be given to every person who has appeared in the cause, or who has any interest in the sale, as well as to the purchaser.[3] A sale may, however, under special circumstances be set aside after confirmation, although more and stronger evidence of fraud or misconduct, or other grounds for invalidating the sale, is then required.[4]

1640. Before confirmation of the sale the court may open the biddings at the instance of one who is bound to make good any deficiency, on his offering a large advance upon the bid of the mortgagee, who was the purchaser, and paying the costs of the former sale.[5] It has been the practice in England to open biddings upon the offer of a reasonable advance beyond the last bid;[6] but this practice has not prevailed very much here,[7] and its utility has been doubted or denied quite generally.[8] The opening of biddings, instead of being a practice here, is rather something that is allowed in special cases; and generally something more than inadequacy of price must be shown, unless this be very gross.

In Alabama, when the property has been purchased by the mortgagee, a resale will be ordered before confirmation if an advance of not less than ten per cent. on the former sale is offered and the money is deposited in court.[9]

1641. Great inadequacy of price may be urged with force against a confirmation of the sale, because this is incomplete and

[1] Murdock *v.* Empie, 19 How. (N. Y.) Pr. 79.

[2] Stahl *v.* Charles, 5 Abb. (N. Y.) Pr. 348.

[3] Robinson *v.* Meigs, 10 Paige (N. Y.), 41; St. John *v.* Mayor, &c. of N. Y. 6 Duer (N. Y.), 315; 13 How. Pr. 527.

[4] Lansing *v.* McPherson, 3 Johns. (N. Y.) Ch. 424.

[5] Lansing *v.* McPherson, 3 Johns. (N. Y.) Ch. 424. In this case the offer was an advance of fifty per cent. See, also, Mott *v.* Walkley, 3 Edw. (N. Y.) 590.

[6] Garstone *v.* Edwards, 1 S. & S. 20. Vice-Chancellor Leach said: "The court does not confine itself to a particular per cent., although £10 per cent. is a sort of general rule." The advance must be at least £40 to cover expenses. Farlow *v.* Weildon, 4 Madd. 460.

[7] Williamson *v.* Dale, 3 Johns. (N. Y.) Ch. 292; Lefevre *v.* Laraway, 22 Barb. 167, 173.

[8] Duncan *v.* Dodd, 2 Paige (N. Y.), 99; Collier *v.* Whipple, 13 Wend. (N. Y.) 224; Adams *v.* Haskell, 10 Wis. 123.

[9] Littell *v.* Zuntz, 2 Ala. 256.

depends upon the equitable discretion of the court for completion.[1] Until the sale is approved by court the purchaser does not acquire any independent right by his purchase; he may be regarded merely as an accepted or preferred bidder. The inadequacy of price may be such as to be of itself an indication of fraud or unfairness; and if not so gross as to indicate fraud, when taken in connection with other circumstances, it is ground for setting the sale aside and ordering a resale; as, for instance, when a party whose interests are injuriously affected by the sale has been prevented from attending it through mistake or misapprehension.[2]

In general a resale may be had for any cause which would be a ground for setting aside the sale after confirmation; and causes of like nature, which might not be regarded as sufficient for setting aside the sale after it has been completed, will be sufficient to prevent confirmation and subject the property to a resale.[3]

6. *Enforcement of Sale against Purchaser.*

1642. One who bids off property at a foreclosure sale becomes a quasi party to the suit, so that he subjects himself to the jurisdiction of the court, and may be compelled to pay the amount bid.[4] The fact that he acts for another person will not relieve him if he makes the bid in his own name.[5] Neither lapse of time nor the death of the original parties to the suit will bar the right of the court to compel his compliance with the conditions of sale.[6] If, however, the delay be unreasonable, and in the mean time there has been a material change detrimental to his interests, the purchase will not be enforced. According to the English practice, on the failure of the purchaser without good cause to comply with the terms of sale, if it appears that he is unable to perform his contract, the parties interested in the sale

[1] See chapter xl, division 14; Vanbussum *v.* Maloney, 2 Metc. (Ky.) 550; Busey *v.* Hardin, 2 B. Mon. (Ky.) 411; Williams *v.* Woodruff, 1 Duvall (Ky.), 257; Taylor *v.* Gilpin, 3 Metc. (Ky.) 544; Horsey *v.* Hough, 38 Md. 130.

An offer to bid $2,400 at a resale, when the premises brought $2,000 at the original sale, is no ground for refusing to confirm. Allis *v.* Sabin, 17 Wis. 626. See, also, Bullard *v.* Green, 10 Mich. 268.

[2] Wetzler *v.* Schaumann, 24 N. J. Eq. 60. In this case property worth $4,500 was sold for $2,600.

[3] See § 1640.

[4] Casamajor *v.* Strode, 1 Cond. Eng. Ch. 195; Wood *v.* Mann, 3 Sum. 318; Requa *v.* Rea, 2 Paige, 341; Cazet *v.* Hubbell, 36 N. Y. 677; Coulter *v.* Herrod, 27 Miss. 685.

[5] Atkinson *v.* Richardson, 14 Wis. 157; and see Lyon *v.* Elliott, 3 Ala. 654.

[6] Cazet *v.* Hubbell, 36 N. Y. 677; Merchants' Bank *v.* Thomson, 55 N. Y. 7.

may, upon motion, obtain an order discharging the sale, and directing a resale; but if he is responsible, the court may order him to pay the money into court, and may enforce his submission by attachment or order to stand committed; or may order a resale of the estate, and that the purchaser pay the expenses of it, and any deficiency in price arising from it.[1]

1643. Performance is enforced by attachment. The same course is followed in our own courts.[2] The proper tribunal to enforce the purchaser's undertaking is that in which the decree of sale was made, and the application may be by motion.[3] The mode of enforcing compliance with the order of court is by attachment against the person.[4] The fact that upon the purchaser's default remedy may be had by a resale of the lands, or by suit against him for damages, does not deprive the court of the right to enforce performance in this summary way; the option as to remedy lies with the court or the party selling, and not with the purchaser.[5] Even after the purchaser has complied with the terms of sale, by paying part cash and giving a bond and security for the balance, and the sale has been confirmed by court, he may upon his failure to pay the bond be proceeded against by a rule made upon him to show cause why the land should not be sold for the payment of the purchase money; and upon that proceeding a decree may be made for the sale of the land.[6]

In a case where the purchaser refused to complete the purchase after having made a small deposit, he was ordered to show cause why an attachment should not issue against him. The Chancellor said "that he had no doubt of the power of the court to

[1] 2 Daniel's Ch. Pr. 1460–1462; Harding *v.* Harding, 4 M. & C. 514; Lansdown *v.* Elderton, 14 Ves. 512. It was formerly the rule that a forfeiture of the deposit was the only redress against the purchaser. Saville *v.* Saville, 1 P. Wms. 745.

[2] Clarkson *v* Read, 15 Gratt. (Va.) 288; Anderson *v.* Foulke, 2 Har. & Gill (Md.), 346; Richardson *v.* Jones, 3 Gill & Johns. (Md.) 163; Gordan *v.* Saunders, 2 McCord (S. C.) Ch. 151; Brasher *v.* Cortlandt, 2 Johns. (N. Y.) Ch. 505.

[3] Wood *v.* Mann, 3 Sumn. 318, 326.

[4] Graham *v.* Bleakie, 2 Daly (N. Y.), 55; Miller *v.* Collyer, 36 Barb. (N. Y.) 250.

[5] Wood *v.* Mann, *supra;* Cazet *v.* Hubbell, 36 N. Y. 677. In Leaton *v.* Slade, Lord Eldon said: "If you make out that the seller would have been at liberty to resell, that does not make out that he lets the other off."

[6] Clarkson *v.* Read, 15 Gratt. (Va.) 288. In Richardson *v.* Jones, 3 Gill & John. (Md.) 163, it was held, contrary to the decision above, that the power of the court does not extend to enforcing sales on credit after the purchaser has once complied with the terms of sale by giving security; that the remedy is at law on the security.

coerce a purchaser where the conditions of sale had not given an alternative. That in this case the forfeiture of the deposit would not be sufficient, either as punishment to the one party or a satisfaction to the other." He was ordered to pay the money in six days, or that an attachment issue.[1]

The fact that the purchaser has been ordered to complete the purchase after a specific objection to the title or to the parties does not decide a question of title not brought to the consideration of the court by objection, and is no protection to the purchaser against persons having vested interests in the equity of redemption, who ought to have been, but were not, made parties to the suit.[2]

1644. Forfeiture of deposit. — If the purchaser without good cause does not complete the purchase, he forfeits the deposit made at the time of sale, so far as it may be needed to make up a deficiency in price on a resale.[3] He is also chargeable with the expenses of the resale.[4] A resale is ordered, and if there is a loss in price from the former sale, judgment may be had against the purchaser for the difference towards which the deposit will be applied.[5] When it is desired to hold a third person responsible for the loss as the real purchaser, instead of the person who bid at the sale, the order for resale should require the payment to be made by him, and the suit cannot be maintained against him, when the order requires the payment to be made by the bidder.[6] If on the purchaser's default a resale be made without any application to the court to the same purchaser, he is liable only on his bid at the second sale.[7]

1645. If there be a defect in the title unknown to the purchaser at the time of sale, the court will not ordinarily compel him to take a deed and complete the purchase. An inchoate right of dower is such a defect; and so is a prior mortgage, or other lien or charge upon the land.[8]

[1] Brasher *v.* Cortlandt, 2 Johns. (N. Y.) Ch. 505.

[2] Williamson *v.* Field, 2 Sandf. (N. Y.) Ch. 533.

[3] Willets *v.* Van Alst, 26 How. (N. Y.) Pr. 325.

[4] Knight *v.* Maloney, 4 Hun (N. Y.), 33. But he is not chargeable with the expense of curing a formal irregularity in the foreclosure. S. C. 2 N. Y. Weekly Dig. 40.

[5] Graham *v.* Bleakie, 2 Daly (N. Y.), 55.

[6] Paine *v.* Smith, 2 Duer (N. Y.), 298.

[7] Home Ins. Co. *v.* Jones, 45 How. (N. Y.) Pr. 498.

[8] Fryer *v.* Rockefeller, 63 N. Y. 268; Merchants' Bank *v.* Thomson, 55 N. Y. 7; Simar *v.* Canaday, 53 N. Y. 298; Mills *v.*

The innocent bidder is entitled to be repaid his proper expenses. These include the deposit paid by him on the sale, the expenses of the examination of the title, and the costs of the motion for repayment.[1] The repayment is made out of the funds in the case if there are any; and if not, the plaintiff must pay the expenses in the first instance, but may recover them over in a suit or upon a resale. If, however, the defect in the proceedings result from the plaintiff's negligence in omitting to make some one interested under the mortgage a party to the suit, as, for instance, the owner of the equity of redemption, such expenses cannot be deducted from the surplus moneys arising from the second sale, as these belong to the owner of the equity, and he is not responsible for the irregularity in the sale.[2]

1646. Defect in the title prior to the mortgage does not excuse the purchaser from carrying out his purchase. He buys the title of the mortgagor as it existed at the time of the making of the mortgage, and nothing more. The foreclosure cuts off the equity of redemption, and by the sale he gets the mortgage title divested of all rights of the mortgagor and those claiming under him subsequent to the mortgage. He takes the risk of the mortgagor's having any title that passed by the mortgage.[3] If the title by the mortgage purports to be an estate in fee, when it is in fact only a leasehold interest, although the judgment, following the terms of the mortgage, erroneously directs a sale of the premises as in fee, the purchaser is bound by the sale, if he has notice at the time of the facts, and of the leasehold title of the mortgagor. The sale under the judgment transfers whatever title the mortgagor had.[4] The purchaser cannot be relieved on account of defects in the property, or in the title to it, of which he had notice, and in reference to which he may be supposed to have bid.[5]

Van Voorhies, 20 N. Y. 412; Hirsch *v.* Livingston, 3 Hun (N. Y.), 9; S. C. 48 How. Pr. 243; Veeda *v.* Fonda, 3 Paige (N. Y.), 94; Seaman *v.* Hicks, 8 Paige (N. Y.), 655; Shiveley *v.* Jones, 6 B. Mon. (Ky.) 274.

[1] Morris *v.* Mowatt, 2 Paige (N. Y.), 586.

[2] Raynor *v.* Selmes, 52 N. Y. 579; reversing S. C. 7 Lans. 440.

[3] Fryer *v.* Rockefeller, 4 Hun (N. Y.), 800; S. C. 63 N. Y. 268; Riggs *v.* Pursell, 66 N. Y. 193; Holden *v.* Sackett, 12 Abb. (N. Y.) Pr. 473; Boggs *v.* Fowler, 16 Cal. 559; Strong *v.* Waddell, 56 Ala. 471; and see Osterberg *v.* Union Trust Co. 93 U. S. 424.

[4] Graham *v.* Bleakie, 2 Daly (N. Y.), 55.

[5] Riggs *v.* Pursell, 66 N. Y. 193.

A purchaser at a foreclosure sale is presumed to know the condition of the title which he purchases. If the mortgage contains no covenant of warranty, and the title proves defective, the purchaser has no claim upon the mortgagor to make it good; nor will any outstanding and paramount title subsequently acquired by the mortgagor enure to the benefit of the purchaser; although while the relation of mortgagor and mortgagee existed a title acquired subsequent to the mortgage would go to strengthen the mortgage security. When that relation is extinguished by foreclosure, the mortgagor is under no obligation to protect the purchaser's title.[1] So also the purchaser is affected with notice of all the defects and irregularities of the foreclosure and sale that appear of record, and is bound to take notice that a junior mortgagee, or other incumbrancer of record, was not made a party to the suit, and therefore may redeem.[2]

The purchaser after having completed the sale and paid over the money cannot call upon the mortgagee to make restitution of any part of it on the ground that the title has proved defective, and the purchaser has been forced to pay a further sum to perfect it. His only remedy is to avail himself of the covenants of the several conveyances preceding the conveyance to the mortgagee.[3]

1647. Errors in the decree or in the proceedings under it afford no ground for relieving the purchaser from the sale, after its confirmation.[4] Of course the purchaser may take objection, even after confirmation, to a defect arising from a want of jurisdiction in the court;[5] but he need not look further than to the judgment and the deed given in execution of it, so long as they stand unimpeached. Erroneous rulings in the case upon questions of law do not concern him.[6] Even if the decree be erroneous it cannot be attacked collaterally.[7] After a decree and sale under it, the validity of the mortgage cannot again be called in question.[8] If the decree was valid, and the execution and deed are regular, a purchaser in good faith acquires a good title to the

[1] Jackson *v.* Littell, 56 N. Y. 108.

[2] McKernan *v.* Neff, 43 Ind. 503; Piel *v.* Brayer, 30 Ind. 332; Alexander *v.* Greenwood, 24 Cal. 505.

[3] McMurray *v.* Brasfield, 10 Heisk. (Tenn.) 529.

[4] Worsham *v.* Hardaway, 5 Gratt. (Va.) 60; Threlkelds *v.* Campbell, 2 Gratt. (Va.) 198; Daniel *v.* Leitch, 13 Gratt. (Va.) 195; Splahn *v.* Gillespie, 48 Ind. 397; Sowles *v.* Harvey, 20 Ind. 217.

[5] Boggs *v.* Fowler, 16 Cal. 559.

[6] Mills *v.* Ralston, 10 Kans. 206.

[7] Ogden *v.* Walters, 12 Kans. 282.

[8] Gest *v.* Flock, 2 N. J. Eq. (1 Green) 108.

property, although as against the mortgagor the decree was erroneous.[1]

A purchaser, however, under the foreclosure of an unregistered mortgage, is not such a *bonâ fide* purchaser as to acquire any rights against one who had taken a conveyance from the mortgagor after the mortgage and before foreclosure, and who was in possession at the time of the foreclosure sale.[2] Although the mortgage has been paid but left undischarged of record, one purchasing in good faith at a foreclosure sale under the mortgage acquires a good title as against the mortgagor and those claiming under him.[3]

1648. Reference as to title. — While the purchaser under a judicial sale submits himself to the jurisdiction of the court, and may be compelled to carry out his contract, he is also entitled to the protection of the court in respect to the avoidance of the purchase, if by reason of imperfections in the title or otherwise he is freed from his agreement.[4] He may apply for a reference to inquire into the title. The abstract of title and deeds and the statement of facts being laid before the referee, the purchaser may examine them and file objections. If the report be against the title, the purchaser may move to be discharged and for a return of his deposit and for costs.[5] It is well settled that if there be a reasonable doubt as to the soundness of the title the court will not compel the purchaser to complete the purchase, even if the better opinion be that the title is good.[6]

If the master upon examination of the abstract of title, and the facts bearing upon it, reports that the title is defective or doubtful, the purchaser may upon motion be discharged, and have an order for the repayment of his deposit and for the costs of the reference.[7] He will not of course be compelled to complete the purchase if the proceedings for any reason were void, as for want of jurisdiction in the court to entertain the case; or if a party in interest, as, for instance, one tenant in common of the premises, has not been served with process;[8] or if an incumbrancer is not

[1] Splahn *v.* Gillespie, 48 Ind. 397.

[2] Hawley *v.* Bennett, 5 Paige (N. Y.), 104.

[3] Atwater *v.* Seymour, Brayt. (Vt.) 209.

[4] Hoffman's Referees, 240.

[5] Ib. 241, 242.

[6] Abel *v.* Heathcote, 2 Ves. 100; Stapylton *v.* Scott, 16 Ves. 272.

[7] Graham *v.* Bleakie, 2 Daly (N. Y.), 55; and see Ormsby *v.* Terry, 6 Bush (Ky.), 553.

[8] Cook *v.* Farnam, 21 How. (N. Y.)

made a party to the suit.[1] A bidder's liability is terminated if the sale is not reported to the court, or approved when reported; or if the master sells the property again on his own responsibility, and this sale is approved by the court.[2]

If the defect in the title be such that it may be cured, and within a reasonable time releases are obtained or other acts done to remedy the defect, the purchaser cannot refuse to complete the purchase.[3]

If, however, a party in interest has not been made a party to the suit, though this is a ground upon which the purchaser may be relieved from his purchase, he cannot hold on to it, and insist upon having his title perfected by the application of the proceeds of the sale to the payment of the outstanding claim.[4]

1649. Taxes. — Neither will a purchaser be required to complete the purchase when he will not obtain such an interest in the property as he had a right to suppose from the terms of sale he was buying.[5] Where by the terms of sale the premises are sold free from incumbrances, the taxes and assessments to be paid out of the purchase money, and there is a large assessment still unconfirmed by the municipal authorities, and which cannot be paid, the purchaser is not bound to complete the purchase and take the property subject to the assessment.[6] If, however, the property can be relieved of incumbrance by payment of the tax, the court may direct the master to satisfy the claim out of the proceeds of sale and thus relieve the title from the objection.[7]

The purchaser himself cannot retain from his bid a sum sufficient to pay the taxes.[8]

1650. A purchaser may by his conduct preclude the opening of the sale. If, during the progress of a foreclosure sale, he has announced to the other bidders that he had prior incumbrances on the property, and that the sale would be made sub-

Pr. 286; 34 Barb. (N. Y.) 95; 12 Abb. Pr. 359.

[1] Verdin *v.* Slocum, 71 N. Y. 345.

[2] Dills *v.* Jasper, 33 Ill. 262.

[3] Graham *v.* Bleakie, 2 Daly (N. Y.), 55. In Coffin *v.* Cooper, 14 Ves. 205, the Lord Chancellor said: "That where the master's report is, that by getting in a term, or obtaining administration, the vendor will have a title, the court will put him under terms to procure it speedily."

[4] Duvall *v.* Speed, 1 Md. Ch. Dec. 235.

[5] Seaman *v.* Hicks, 8 Paige (N. Y.), 655.

[6] Post *v.* Leet, 8 Paige (N. Y.), 337; see, also, Easton *v.* Pickersgill, 55 N. Y. 310.

[7] Lawrence *v.* Cornell, 4 Johns. (N. Y.) Ch. 542.

[8] Osterberg *v.* Union Trust Co. 93 U. S. 424.

ject to these, he cannot consistently ask to be relieved from his own bid, on the ground that he supposed he would be entitled to have the surplus moneys applied to the payment of his prior incumbrances. He must be presumed to understand that if others on his own announcement were bidding for the property, subject to the incumbrances, he was competing with them on equal terms.[1]

A purchaser may also by his own conduct with reference to the property practically confirm a sale, so as to preclude himself from having the sale opened; as where he has taken possession of the premises under a claim of title derived from the sale, paid laborers for work upon them, and made arrangements for planting crops for the following year.[2]

1651. An irregularity in the foreclosure proceedings which is merely formal, and cannot result in injury to the purchaser, is no ground for his refusing to complete the purchase; and if on his refusal to complete the purchase a resale is ordered, he is chargeable with the expenses of it.[3] The purchaser has a right to insist upon the terms of his purchase being complied with. Where by agreement of the parties the referee sold the premises on time, the purchaser cannot be compelled to pay cash.[4]

Judicial sales must be conducted with the utmost fairness and good faith; and if a purchaser at a sale under a decree of foreclosure of a junior mortgage is by false representations induced to believe that the proceeds of the sale will be applied to payment of the prior mortgage, and that he would take a clear title, the sale will be set aside;[5] and so also it will be set aside where the purchaser thought he was buying an absolute title to the land, and not one subject to the first mortgage.[6]

7. *The Deed, and passing of Title.*

1652. It is a recognized practice to allow another person to be substituted for the purchaser, and to take the deed directly to himself.[7] Any equitable rights or liens acquired by third per-

1 Ledyard *v.* Phillips, 32 Mich. 13.

2 Ledyard *v.* Phillips, *supra.*

3 Knight *v.* Moloney, 4 Hun (N. Y.), 33.

4 Rhodes *v.* Dutcher, 6 Hun (N. Y.), 453.

5 Paulett *v.* Peabody, 3 Neb. 196.

6 Shiveley *v.* Jones, 6 B. Mon. (Ky.) 274. See Vanderkemp *v.* Shelton, 11 Paige (N. Y.), 28.

7 Proctor *v.* Farnam, 5 Paige (N. Y.), 619; Rorer on Jud. Sales, 145; Ehleringer *v.* Moriarty, 10 Iowa, 78; McClure *v.* Engelhardt, 17 Ill. 47; Splahn *v.* Gillespie, 48 Ind. 397.

sons against the original purchaser before the assignment are protected. Where the original purchaser had entered into a contract of sale of the premises with another, and had died, in the absence of his heir, the court ordered a conveyance to the substituted purchaser, and the payment of the money into court.[1]

1653. Delivery of deed. — The master's deed passes the title to the purchaser at the moment of delivery, though the sale has not been confirmed.[2] From that time the property is at his risk, and having accepted the deed he cannot repudiate the contract.[3] The holder of the deed has *primâ facie* a valid title to the land described in it.[4] In England the practice is to withhold the deed until the final order confirming the sale is made absolute, but the confirmation relates back to the delivery of the deed, and gives it effect from that time.[5] The practice in this country in this regard is not uniform. The better practice is to report the sale and obtain a confirmation of it before the delivery of the deed; but in some states, and especially in those in which a time for redemption is allowed after the sale, it is the practice to delay the report until the deed is executed and delivered.[6] If in such case the mortgagor delays to move for the filing of the report and the setting aside of the sale until the deed is delivered, he is regarded as waiving all objections to the sale which are merely formal.[7]

When a judgment in foreclosure provides that the purchaser shall be let into possession, upon production of the referee's deed, the purchaser acquires no title or right of possession until the delivery of the deed to him, and therefore he is not entitled to the rents from the time of sale by relation back, although he is charged with interest on the purchase money from that time; until the deed is given the owner of the equity is entitled to the possession of the land and to the rents.[8] Upon the delivery of

[1] Pearce *v.* Pearce, 7 Sim. 138.

[2] Fuller *v.* Van Geesen, 4 Hill (N. Y.), 171; S. C. 4 How. Pr. 182; Ford *v.* Burch, 6 Barb. (N. Y.) 60; Mitchell *v.* Bartlett, 51 N. Y. 447; S. C. 52 Barb. 319. For form of sheriff's or referee's deed used in New York, see 5 Wait's Prac. 225, 226.

[3] Jones *v.* Burden, 20 Ala. 382.

[4] Jackson *v.* Warren, 32 Ill. 331; Simerson *v.* Branch Bank at Decatur, 12 Ala. 205.

[5] *Ex parte* Minor, 11 Ves. 559.

[6] Walker *v.* Schum, 42 Ill. 462. In Illinois this was the practice before the enactment allowing redemption after the sale. But since this statute the report is not generally made until after the deed is executed and delivered, and sometimes it is never reported and confirmed at all.

[7] Walker *v.* Schum, *supra;* Fergus *v.* Woodworth, 44 Ill. 374, 379.

[8] Mitchell *v.* Bartlett, 51 N. Y. 447; S. C. 52 Barb. 319. See, however, Lathrop *v.* Nelson, 4 Dill. 194.

the deed the purchaser is entitled to the proper process of court for the delivery of possession to him as against all the defendants who were before the court.[1] When consummated by the deed, the sale passes as against them the entire estate held by the mortgagor, whatever it may have been at the date of the mortgage; and the purchaser is entitled upon the receipt of his deed to the possession of the premises, even though the plaintiff pending the action has conveyed the property to one of the defendants.[2]

1654. As the title of the purchaser relates back to the time of the execution of the mortgage, it does not matter to him what disposition the mortgagor may afterwards have made of the property if the foreclosure is perfect. All conditions and reservations and easements, as well as all incumbrances or liens, he may have afterwards imposed upon the property are extinguished.[3] In this respect the purchaser's rights are the same whether the sale be under a decree of a court of equity, under a judgment in *scire facias*, or under a power in the mortgage or trust deed. The title takes effect by virtue of the original deed; the sale carries that title, and cuts off all liens and interests created subsequent to the mortgage.

Title acquired by foreclosure relates back to the date of the mortgage, so as to cut off intervening equities and rights. If all subsequent purchasers and incumbrancers are made parties to the bill, the title under the mortgage foreclosed is perfected to an absolute one. In such case the purchaser acquires the title of the mortgagee, and also the title of the mortgagor as it stood at the time of the making of the mortgage.[4] If the mortgage was of an undivided interest in common with others, the purchaser acquires the same interest.[5] He obtains the title of all the parties to the suit, whether their title be that which is set forth in the bill or not. Whatever the title of the parties to the suit may be,

[1] Frisbie *v.* Fogarty, 34 Cal. 11.

[2] Montgomery *v.* Middlemiss, 21 Cal. 103; Belloc *v.* Rogers, 9 Cal. 125.

[3] King *v.* M'Cully, 38 Pa. St. 76; Davis *v.* Conn. Mut. Life Ins. Co. 84 Ill. 508.

[4] Ritger *v.* Parker, 8 Cush. Mass. 145; Brown *v.* Tyler, 8 Gray (Mass.), 135; Marston *v.* Marston, 45 Me. 412; Haynes *v.* Wellington, 25 Me. 458; Taylor *v.* Kearn, 68 Ill. 339; Vroom *v.* Ditmas, 4 Paige (N. Y.) Ch. 526, 531; M'Millan *v.* Richards, 9 Cal. 365; Poweshiek Co. *v.* Dennison, 36 Iowa, 244; Carter *v.* Walker, 2 Ohio St. 339; Frische *v.* Kramer, 16 Ohio, 125; Hodson *v.* Treat, 7 Wis. 263; De Haven *v.* Landell, 31 Pa. St. 120; West Branch Bank *v.* Chester, 11 Pa. St. 282; Hamilton *v.* State, 1 Ind. 128.

[5] Mahoney *v.* Middleton, 41 Cal. 41.

that is what the court undertakes to sell, and what the purchaser is entitled to have conveyed to him.[1] The fact that the purchaser at a foreclosure sale under a first mortgage had previously bought the equity subject to a second mortgage, which he did not expressly stipulate to pay, does not prevent his acquiring a perfect title against that mortgage by the purchase.[2] The mortgagor is estopped from denying the title he has set forth in his mortgage;[3] and all the parties to the foreclosure suit are estopped from disputing the title acquired by the purchaser under the sale.[4] The purchaser occupies the same position, as to the priority of claims or liens on the property, that the mortgagee did.[5]

After a foreclosure sale a mortgagee has no such ownership of the property as will enable him to charge the premises with a lien for labor done and materials furnished.[6]

1655. Errors in deed. — If the master's deed by inadvertence embraces the whole mortgaged premises, of which a portion had been released from the operation of the mortgage and was excepted from the operation of the decree, no title to the released portion passes to the purchaser.[7] Even if this portion of the premises had been embraced in the decree, but were not offered at the sale, the title would not pass by the conveyance.[8]

Where a mortgage by reason of an error in the description did not cover the entire tract intended to be mortgaged, and the error was first discovered after a foreclosure sale and conveyance to a purchaser who supposed he was buying the whole tract, he was protected in the possession of the whole.[9] Usually, however, the property to which the purchaser acquires title is coextensive with the description contained in the mortgage, the bill to foreclose, and the order or writ under which the sale is made.[10]

After the sale is completed and the money paid over by the purchaser, he cannot have the sale set aside and the money repaid

[1] Zollman *v.* Moore, 21 Gratt. (Va.) 313; Gillett *v.* Eaton, 6 Wis. 30; Tallman *v.* Ely, 6 Wis. 244.

[2] Brown *v.* Winter, 14 Cal. 31.

[3] Vallejo Land Assoc. *v.* Viera, 48 Cal. 572.

[4] McGee *v.* Smith, 16 N. J. Eq. 462; White *v.* Evans, 47 Barb. (N. Y.) 179; Holden *v.* Sackett, 12 Abb. (N. Y.) Pr. 473.

[5] Davis *v.* Conn. Mut. Life Ins. Co. 84 Ill. 508.

[6] Davis *v.* Conn. Mut. Life Ins. Co. *supra.*

[7] Laverty *v.* Moore, 32 Barb. (N. Y.) 347.

[8] Laverty *v.* Moore, 33 N. Y. 658, affirming the above.

[9] Waldron *v.* Letson, 15 N. J. Eq. (2 McCart.) 126.

[10] McGee *v.* Smith, 16 N. J. Eq. 462.

by reason of a mistake in the mortgage deed, whereby land not belonging to the mortgagor was described instead of his own land.[1]

1656. After-acquired title. — Ordinarily the title ordered to be sold is only the title which was held by the mortgagor at the date of the mortgage.[2] A title subsequently acquired by the mortgagor will generally be subjected to the lien of the mortgage when that contains full covenants of warranty,[3] even if it was given to secure the purchase money of land, the title of which proves defective and the mortgagor makes it good from another source, the mortgagee having conveyed to him without covenants and without fraud;[4] and even a title acquired by a purchaser from the mortgagor after his purchase may, under equitable circumstances, be subjected to the lien in the same manner. But in order to subject such after-acquired title to sale, the facts should be set forth in the complaint, and the decree should expressly cover the after-acquired title.[5]

1657. Fixtures. — The purchaser's deed taking effect by relation at the date of the mortgage passes the property as it then was with all fixtures subsequently annexed by the mortgagor, such as an engine and boilers used in a flour-mill and permanently attached to the premises.[6] The rule that whatever is fixed to the freehold becomes a part of it applies as strictly between the mortgagor and mortgagee as between vendor and vendee.[7] The purchaser acquires title to the fixtures as a part of the realty. If they are wrongfully severed by any one after the sale, though before the execution of a deed to the purchaser, he may sue for them in trover or take them by replevin,[8] or may recover damages in an action of waste.[9] A mortgagee who comes into possession of the premises, by virtue of a decree of strict foreclosure, acquires title to a barn erected on the premises during the pendency of the foreclosure suit by a stranger with permission of the mortgagor.[10]

[1] Neal *v.* Gillaspy, 56 Ind. 451.

[2] San Francisco *v.* Lawton, 18 Cal. 465.

[3] Bybee *v.* Hageman, 66 Ill. 519.

[4] Hitchcock *v.* Fortier, 65 Ill. 239. Otherwise, where the mortgage contained no covenants of warranty. Smith *v.* De Russy, 29 N. J. Eq. 407.

[5] Kreichbaum *v.* Melton, 49 Cal. 50.

[6] See §§ **428–452**; Sands *v.* Pfeiffer, 10 Cal. 258.

[7] Gardner *v.* Finley, 19 Barb. (N. Y.) 317.

[8] §§ **453–455.**

[9] Lackas *v.* Bahl, 43 Wis. 53.

[10] Preston *v.* Briggs, 16 Vt. 124.

1658. The purchaser is entitled to the crops growing at the time of the delivery of the deed to him in preference to the mortgagor or any one claiming under him whose claim originated subsequently to the mortgage;[1] and he is entitled in preference to one who bids off the property at a sale subsequently made by the assignee in bankruptcy of the mortgagor.[2] If, however, the growing crop be expressly reserved at the sale, it having been previously sold by the mortgagee as administrator of the mortgagor, the purchaser acquires no title to it.[3] But the sheriff or other officer in selling has no authority to reserve the way going crops. If he does so, but does not make the reservation in the deed, it will pass the crops to the purchaser.[4]

1659. The rents accruing between the day of sale and the delivery of the deed belong to the owner of the equity of redemption, and not to the purchaser, as they go with the possession, or the right of possession; and generally the purchaser is not entitled to possession, or to the rents, until he has made a demand for possession under his deed.[5] By statute the judgment debtor not redeeming may be made liable to the purchaser for the rent of the premises, or for use and occupation of the same, after the sale.[6]

1660. When a mortgagee purchases at a sale of the premises under a decree of court, no deed from the trustee appointed to make the sale is requisite to invest him with the legal title. The decree of sale does not of course operate as a conveyance of the legal title, but the purchaser, though a stranger, becomes the substantial owner of the property from the moment the sale is ratified. He is entitled to possession, and no one can eject him. But when the mortgagee purchases the title, according to the doctrine of the common law the legal title is already in him, and the sale confirms him in the possession of the property; and with-

[1] Shepard *v.* Philbrick, 2 Den. (N. Y.) 174; Jones *v.* Thomas, 8 Blackf. (Ind.) 428; Lane *v.* King, 8 Wend. (N. Y.) 584; Crews *v.* Pendleton, 1 Leigh (Va.), 297; Parker *v.* Storts, 15 Ohio St. 351. In Cassilly *v.* Rhodes, 12 Ohio, 88, it was held that a tenant of the mortgagor was entitled to the annual crops.

[2] Gillett *v.* Balcolm, 6 Barb. (N. Y.) 370.

[3] Sherman *v.* Willett, 42 N. Y. 146.

[4] Lowell *v.* Schenck, 24 N. J. Eq. (4 Zab.) 89.

[5] Clason *v.* Corley, 5 Sandf. (N. Y.) 447; Astor *v.* Turner, 11 Paige (N. Y.) 436; Mitchell *v.* Bartlett, 52 Barb. (N. Y.) 319. See § 1120.

[6] As in Indiana: 2 R. S. 1876, p. 720; Gale *v.* Parks, 58 Ind. 117; Clemens *v.* Robinson, 54 Ind. 599.

out a deed from the trustee he can maintain ejectment for the property.[1]

1661. The purchaser has no legal title until the time allowed for redemption has expired.[2] He cannot on his certificate of purchase maintain ejectment or other possessory action. He is not entitled to possession until a deed has been executed to him by the officer selling.[3] He acquires only a lien; no new title vests till the period of redemption has passed. His deed will relate back, it is true, to the beginning of his lien, in order to cut off intervening incumbrances; but it will not carry back the absolute divestiture of title, as is evident from the fact that neither judgment debtor nor mortgagor can be called to account for rents and profits. His title becomes absolute only when his right to a deed accrues. The mortgagor still has the estate of a mortgagor, with this qualification, that the amount and time of redemption have become absolutely fixed by the decree of sale, and his estate will be absolutely divested if he fails to redeem within the allotted time.[4]

But the mortgagor, though entitled to the possession until the period of redemption has expired, is liable for any injury he may do to the premises by cutting and carrying away growing timber.[5] He might be restrained from committing waste by injunction.[6]

1662. An appeal does not affect a sale previously made. The judgment of the court being conclusive so long as it stands unreversed and without appeal, a sale made under it before any appeal is taken and the execution of the judgment stayed is not affected by any appeal afterwards taken, though that part of the decree directing the sale to be made by a referee, instead of the sheriff, be set aside as erroneous.[7]

[1] Launay *v.* Wilson, 30 Md. 536. See §§ **1892, 1893.**

[2] Rockwell *v.* Servant, 63 Ill. 424; Delahay *v.* McConnel, 5 Ill. (4 Scam.) 156.

[3] Bennett *v.* Matson, 41 Ill. 333; O'Brian *v.* Fry, 82 Ill. 274; S. C. Ib. 87.

[4] Stephens *v.* Ill. Mut. F. Ins. Co. 43 Ill. 327; Sweezy *v.* Chandler, 11 Ill. 445; Johnson *v.* Baker, 38 Ill. 99.

[5] Stout *v.* Keyes, 2 Dougl. (Mich.) 184.

[6] Phœnix *v.* Clark, 6 N. J. Eq. (2 Halst.) 447. See §§ **684–698.**

[7] Armstrong *v.* Humphreys, 5 S. C. 128; Breese *v.* Bange, 2 E. D. Smith (N. Y.), 474; Blakeley *v.* Calder, 15 N. Y. 617; Buckmaster *v.* Jackson, 3 Scam. (Ill.) 104; Holden *v.* Sackett, 12 Abb. (N. Y.) Pr. 473.

In Gray *v.* Brignardello, 1 Wall. 634, Mr. Justice Davis stated the rule to be, that "although the judgment or decree may be reversed, yet all rights acquired at a judicial sale while the decree or judgment were in full force, and which they

The rule is the same, although the purchaser was one of the parties to the suit;[1] or even if he had notice at the time of the sale that an effort would be made to obtain a reversal of the decree.[2] The law does not require a purchaser to inspect the record and to see that it is free from error. All that is required of him is to see that there is a subsisting judgment by a court having jurisdiction of the case. "If such was not the rule, no one would become a purchaser at a judicial sale, and all competition would cease, and plaintiffs would become purchasers at their own price."[3]

8. *The Delivery of Possession to Purchaser.*

1663. Possession delivered to purchaser. — It has long been the practice of courts of chancery in England, adopted also in this country, wherever a sale and conveyance of real estate has been decreed, to compel the person in possession of the property to surrender it to the purchaser, by an order, or by injunction, or by a writ of assistance. Lord Hardwicke said that this practice had its origin in the reign of James I.;[4] but Mr. Eden says that this statement is a mistake, as many precedents for injunctions to deliver possession after a decree, and a commission or writ of assistance to the sheriff, are in the printed reports as early as the reign of Queen Elizabeth; and also are found in a manuscript book of orders in the time of Henry VIII., Edward VI., and Mary.[5] But whenever the practice was begun, it has long been fully established both in England and in this country,[6] and is applied to sales under decrees in foreclosure suits.

Accordingly, after a sale has been made under a decree in a foreclosure suit, the court has power to give possession to the purchaser, though the delivery of possession is not made part of the decree. He is not driven to an action of ejectment at law to

authorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made, and authorized the sale." And see Bank of U. S. *v.* Voorhees, 1 McLean, 221.

[1] Gossom *v.* Donaldson, 18 B. Mon. (Ky.) 230.

[2] Irwin *v.* Jeffers, 3 Ohio St. 389.

[3] Fergus *v.* Woodworth, 44 Ill. 374, 384.

[4] Roberdeau *v.* Rous, 1 Atk. 543; Penn *v.* Lord Baltimore, 1 Ves. Sen. 444.

[5] Eden on Injunctions, 261; Waterman's ed. 2d vol. 425.

[6] Dove *v.* Dove, Dickens, 617; S. C. 1 Bro. Ch. 375; Huguenin *v.* Baseley, 15 Ves. 180; Dorsey *v.* Campbell, 1 Bland (Md.), 356, 363; Garretson *v.* Cole, 1 Har. & John. (Md.) 387; Buffum's case, 13 N. H. 14.

obtain possession.[1] But if the person in possession was not a party to the suit, and is a mere stranger who entered into possession before the suit was begun, he cannot be turned out of possession by an execution on the decree.[2] Had he come into possession *pendente lite*, he would be bound by the decree in the same manner as the defendant is.[3] So long as the owner of the premises is in possession, and has the right to redeem under a prior mortgage, a purchaser under a foreclosure sale of a subsequent mortgage can-

[1] Jackson *v.* Warren, 32 Ill. 331; Trabue *v.* Ingles, 6 B. Mon. (Ky.) 82; Suffern *v.* Johnson, 1 Paige (N. Y.), 450; Frelinghuysen *v.* Colden, 4 Paige (N. Y.), 204; Van Hook *v.* Throckmorton, 8 Paige (N. Y.), 33; McGown *v.* Wilkins, 1 Paige (N. Y.), 120; Kershaw *v.* Thompson, 4 Johns. (N. Y.) Ch. 609; Bolles *v.* Duff, 43 N. Y. 469; Williams *v.* Waldo, 3 Scam. 264; Creighton *v.* Paine, 2 Ala. 158; Bright *v.* Pennywit, 21 Ark. 130; Ludlow *v.* Lansing, Hopk. Ch. 231; Valentine *v.* Teller, 1b. 422; Skinner *v.* Beatty, 16 Cal. 156; Horn *v.* Volcano, &c. Co. 18 Cal. 141.

Chancellor Kent, in Kershaw *v.* Thompson, *supra*, fully examines the question of the power of a court of equity to give possession of property sold under its decree, and in his luminous opinion says: —

"It does not appear to consist with sound principle that the court which has exclusive authority to foreclose the equity of redemption of a mortgagor, and can call all the parties in interest before it and decree a sale of the mortgaged premises, should not be able even to put the purchaser into possession against one of the very parties to the suit, and who is bound by the decree. When the court has obtained lawful jurisdiction of a case, and has investigated and decided it upon its merits, it is not sufficient for the ends of justice merely to declare the right without affording the remedy. If it was to be understood that after a decree and sale of mortgaged premises, the mortgagor, or other party to the suit, or, perhaps, those who have been let into the possession by the mortgagor *pendente lite*, could withhold the possession in defiance of the authority of this court, and compel the purchaser to resort to a court of law, I apprehend that the delay, and expense, and inconvenience of such a course of proceeding would greatly impair the value and diminish the results of sales under a decree. . . . . The distribution of power among the courts would be injudicious, and the administration of justice exceedingly defective, and chargeable with much useless delay and expense, if it were necessary to resort, in the first instance, to a court of equity, and afterwards to a court of law, to obtain a perfect foreclosure of a mortgage. It seems to be absurd to require the assistance of two distinct and separate jurisdictions for one and the same remedy, viz., the foreclosure and possession of the forfeited pledge. But this does not, upon due examination, appear to be the case; and it may be safely laid down as a general rule, that the power to apply the remedy is coextensive with the jurisdiction over the subject matter."

In **New Jersey** the practice is of recent adoption; but the propriety of it, and the power of the court to apply it, are fully established in the case of Schenck *v.* Conover, 13 N. J. Eq. 220.

In **New York** it is now provided by statute that where any person shall continue in possession of any real estate sold pursuant to the foreclosure of a mortgage, possession may be recovered by summary proceedings. 3 R. S. 823; Laws, 1874, c. 208.

[2] Benhard *v.* Darrow, Walker's Ch. (Mich.) 519.

[3] Kessinger *v.* Whittaker, 82 Ill. 22.

not recover possession from him. He has the legal right to retain possession until such equity has been foreclosed and sold under the prior mortgage; and it does not matter that he is barred by the statute of limitations from bringing his suit to redeem it.[1]

The remedy for obtaining possession when this is wrongfully withheld from the purchaser is an order of court, which if not obeyed may be followed by an injunction, or if need be by a writ of assistance.[2] If the order for the delivery of possession be not included in the decree, a special order may be entered; but the writ of assistance may follow after a refusal to obey the order.[3] It will be granted also at the instance of the purchaser, or of the complainant; and it may be issued not only against the defendant, but as well against any person in possession under him, or holding by any title not paramount to the mortgage.[4] If a tenant is in possession, the deed should be shown him by the purchaser when he makes demand of possession, and upon his refusal to comply, notice of the application to court should be given.[5] As against a party to the suit the writ will be granted upon a motion *ex parte*, but it would seem that one who has come into possession *pendente lite* would be entitled to notice of the motion.[6] The writ of assistance is the only process necessary for giving possession, and should issue in the first instance without a prior injunction, upon proof of the service of the order to deliver possession and of refusal to comply with it.[7]

[1] Wells *v.* Pierce, 42 N. Y. 102.

[2] Montgomery *v.* Tutt, 11 Cal. 190; O'Brian *v.* Fry, 82 Ill. 87; Aldrich *v.* Sharp, 4 Ill. (3 Scam.) 261; Kershaw *v.* Thompson, 4 Johns. (N. Y.) Ch. 609; Van Hook *v.* Throckmorton, 8 Paige (N. Y.), 33; Frelinghuysen *v.* Colden, 4 Paige (N. Y), 204.

In **South Carolina**, under the recent Code, the remedy is an order of the court, and a writ of *habere facias possessionem* is not necessary or proper. Armstrong *v.* Humphreys, 5 S. C. 128.

In **Alabama** an appeal from the order directing a writ of assistance to issue may be taken by the tenant against the purchaser, though a writ of error will also lie. Creighton *v.* Planters' & Merchants' Bank, 3 Ala. 156.

[3] O'Brian *v.* Fry, 82 Ill. 87; Oglesby *v.* Pearce, 68 Ill. 220; Kessinger *v.* Whittaker, 82 Ill. 22.

[4] Schenck *v.* Conover, 13 N. J. Eq. 220.

[5] Fackler *v.* Worth, 13 N. J. Eq. (2 Beas.) 395; N. Y. Life Ins. & Fire Co. *v.* Rand, 8 How. (N. Y.) Pr. 39.

[6] Benhard *v.* Darrow, Walk. Ch. (Mich.) 519; Commonwealth *v.* Ragsdale, 2 Hen. & Mun. (Va.) 8; Lynde *v.* O'Donnell, 12 Abb. (N. Y.) Pr. 286; 21 How. Pr. 34.

[7] 2 Daniel's Ch. Pr. 1280; Schenck *v.* Conover, *supra;* Hart *v.* Linsday, Walk. (Mich.) 144; Valentine *v.* Teller, Hopk. Ch. (N. Y.) 422; Ballinger *v.* Waller, 9 B. Mon. (Ky.) 67.

1664. Possession will be given to the purchaser not only as against all the parties to the suit, but also as against any persons who have come into possession under them pending the suit.[1] But possession acquired by any one after the purchaser has received his deed and conveyed the premises to another will not be interfered with. Neither is one who enters fifteen months after the sale deemed as having entered pending the suit, and therefore he cannot be removed by a writ of assistance, though he entered under a party to the suit.[2] Though one enter pending the suit, if he did not enter under a party to the suit, or under any one who had derived title to the premises, or had gone into possession of them under a party pending the suit, he cannot be turned out of possession under the decree;[3] as, for instance, if he purchased after the commencement of the suit, at a sale under a judgment against the mortgagor recovered before that time.[4]

1665. If the person in possession shows a right paramount to the mortgage, of course the court will not attempt to decide any question of legal title, and the possession must then be sought for by proceedings at law. Such would be the case when the party in possession claims under a lease made before the mortgage under which the sale has been made.[5] If the purchaser allows the mortgagor to remain in possession under an agreement to redeem, he is after that in possession under this contract, and not as defendant in the foreclosure suit; and therefore he cannot be removed under a writ of assistance.[6] The exercise of the power of the court to deliver possession in any case rests in the sound discretion of the court, and in cases of doubtful right the possession will be left to legal adjudication.[7]

1666. Until the purchaser has complied with the terms of sale,[8] and a deed has been executed to him by the selling officer, he is not entitled to an order of court to be let into possession.[9]

[1] Bell *v.* Birdsall, 19 How. (N. Y.) Pr. 491; Kessinger *v.* Whittaker, 82 Ill. 22.

[2] Betts *v.* Birdsall, 11 Abb. (N. Y.) Pr. 222; 19 How. Pr. 491.

[3] Van Hook *v.* Throckmorton, 8 Paige (N. Y.), 33.

[4] Frelinghuysen *v.* Colden, 4 Paige (N. Y.), 204.

[5] Thomas *v.* De Baum, 14 N. J. Eq. 37.

[6] Toll *v.* Hiller, 11 Paige (N. Y.), 228.

[7] McKomb *v.* Kankey, 1 Bland Ch. (Md.) 363, note c.; Thomas *v.* De Baum, 14 N. J. Eq. 37.

[8] Armstrong *v.* Humphreys, 5 S. C. 128.

[9] Clason *v.* Corley, 5 Sandf. (N. Y.) 447; Bennett *v.* Matson, 41 Ill. 332; Myers *v.* Manny, 63 Ill. 211. In Wiscon-

He is not entitled to a deed until he has paid the whole of the purchase money. Even if the purchaser be a junior mortgagee, and is entitled to a portion of the surplus money, he will be required to pay in the whole of it, especially if there are other incumbrancers who might, perhaps, have claims upon the surplus superior to his.[1]

As already noticed, a purchaser is not generally entitled to the rents until he receives a deed of the property; but after this has been delivered to him, and he has demanded possession under it, he is entitled to the accruing rents.[2] If he is put into possession of the land immediately upon the sale and before the payment of the purchase money, he is chargeable with interest upon this to the time of payment.[3]

1667. These summary proceedings do not preclude remedy by suit at law.[4] In such case the plaintiff must in the first place show a valid foreclosure.[5] The validity and execution of the mortgage cannot, however, be inquired into.[6] The decree in the foreclosure suit, and the sale under it, are conclusive if regular; and, therefore, a mortgagor cannot defend the action on the ground that the premises are his homestead; that defence is available only in the foreclosure suit.[7]

9. *Setting aside of Sale.*

1668. A sale under a decree of foreclosure may be set aside by a bill in equity brought for the purpose, when the sale has been fraudulently conducted to the prejudice of the plaintiff, even when he might have a remedy by motion in the original suit.[8] He then has a legal and absolute right independent of the discretion of the court.[9] When the rights of third persons have accrued, some original proceeding is necessary in which these rights may be tried in the ordinary way: they cannot be adjudicated in a

sin, by rule of court (1857), the purchaser was entitled to be let into possession before confirmation of the sale. Loomis *v.* Wheeler, 18 Wis. 524.

[1] Battershall *v.* Davis, 23 How. (N. Y.) Pr. 383.

[2] Castleman *v.* Belt, 2 B. Mon. (Ky.) 157; Clason *v.* Corley, 5 Sandf. (N. Y.) 447.

[3] Haven *v.* Grand Junc. R. R. & Depot Co. 109 Mass. 88.

[4] Kessinger *v.* Whittaker, 82 Ill. 22.

[5] Dwight *v.* Phillips, 48 Barb. (N. Y.) 116. See Heyman *v.* Babcock, 30 Cal. 367.

[6] Hayes *v.* Shattuck, 21 Cal. 51.

[7] Haynes *v.* Meek, 14 Iowa, 320.

[8] Vandercook *v.* Cohoes Sav. Inst. 5 Hun (N. Y.), 641; McMurray *v.* McMurray, 66 N. Y. 175.

[9] See Gould *v.* Mortimer, 26 How. (N. Y.) Pr. 167.

summary manner upon motion.[1] But ordinarily, if there is nothing to prevent an application in the original suit, an original bill for this purpose cannot be sustained;[2] and when the proceedings are regular and free from fraud, and the party is only equitably entitled to relief, his only remedy is by motion in the foreclosure suit, addressed to the discretion of the court, to open the biddings or set aside the sale.[3] In allowing him to come in, the court may impose such terms as may seem proper. This application may be made by any one injured by the proceedings under the decree, although he is not a party to the suit.[4]

The motion for resale, when founded on facts not apparent upon the record, should properly be heard and determined upon affidavit.[5]

The purchaser under the sale sought to be set aside should be made a party to the bill, or should be notified of the motion made for that purpose. Third persons who have bought of the first purchaser should in like manner have an opportunity to be heard.[6]

1669. An application for a resale can be made only by some one who is either interested in the mortgaged premises, or is under personal liability for a deficiency.[7] A sale will not be set aside at the instance of one who was not a party to the suit, when he was not made a party through his own negligence in having his deed recorded, and his grantor, who appeared by the record to be the owner of the property when the suit was brought, was properly made a defendant.[8] If the applicant be a subsequent mortgagee who holds his mortgage only as collateral security for the debt of a third person, he should on equitable grounds be required to exhaust his remedy against the principal debtor before he can have the sale set aside.[9] It must be made without

[1] Crawford *v.* Tuller, 35 Mich. 57.

[2] Brown *v.* Frost, 10 Paige (N. Y.), 243.

[3] McCotter *v.* Joy, 30 N. Y. 80; Smith *v.* Am. Life Ins. Co. Clarke (N. Y.) Ch. 307; White *v.* Coulter, 1 Hun (N. Y.), 357.

[4] Gould *v.* Mortimer, 26 How. (N. Y.) Pr. 167; Am. Ins. Co. *v.* Oakley, 9 Paige (N. Y.), 259; Brown *v.* Frost, 10 Paige (N. Y.), 243; Nicholl *v.* Nicholl, 8 Paige (N. Y.), 349.

[5] Savery *v.* Sypher, 6 Wall. 157.

[6] Lawrence *v.* Jarvis, 36 Mich. 281; Crawford *v.* Tuller, 35 Mich. 57.

[7] Bodine *v.* Edwards, 3 Ch. Dec. 46; S. C. 2 N. Y. Leg. Obs. 231; Gould *v.* Mortimer, 26 How. (N. Y.) Pr. 167; May *v.* May, 11 Paige (N. Y.), 201.

[8] § 1412; Leonard *v.* N. Y. Bay Co. 28 N. J. Eq. 192.

[9] Soule *v.* Ludlow, 3 Hun, 503; S. C. 6 Thomp. & C. 24; Depew *v.* Dewey, 2 S. C. 515; S. C. 46 How. (N. Y.) Pr. 441.

delay; though relief has been granted even after two or three years, when the purchaser had not parted with his title, and there was a reasonable excuse for the delay.[1]

A wife having only an inchoate right of dower in the premises cannot sustain an application made in the lifetime of her husband to set aside a foreclosure sale, or the decree of sale, on the ground that she was not made a party to the suit, or was not properly served with summons.[2] If, instead of applying for a resale, the party interested agrees with the purchaser for a future redemption of the premises, and for the possession in the mean time, the court will not afterwards set aside the sale.[3]

If no one applies for a resale, and all parties are content that the sale shall stand, and justice can be done without it, the court will not order a resale of its own motion.[4]

1670. After confirmation of the sale, it will not be set aside on account of inadequacy of price, unless it be also shown that the sale was unfairly conducted, or there was fraud or surprise or mistake, which prevented the obtaining of any adequate price.[5] The fact that a higher price may reasonably be expected on a resale is by itself no ground for granting it.[6] Any unfairness or misrepresentation on the part of the purchaser, by which a person interested in the property is prevented from attending the sale and bidding, and the purchaser obtains the property at a price considerably below its actual value, is a good ground for setting the sale aside.[7] Thus a resale was ordered where, upon fore-

[1] Fergus *v.* Woodworth, 44 Ill. 374; Nicholl *v.* Nicholl, 8 Paige (N. Y.), 349.

[2] White *v.* Coulter, 1 Hun (N. Y.), 357. See, however, Cain *v.* Gimon, 36 Ala. 168.

[3] Toll *v.* Hiller, 11 Paige (N. Y.), 228.

[4] Eleventh Ward Sav. Bank *v.* Hay, 55 How. (N. Y.) Pr. 444.

[5] Am. Ins. Co. *v.* Oakley, 9 Paige (N. Y.), 259; Tripp *v.* Cook, 26 Wend. (N. Y.) 143; Whitbeck *v.* Rowe, 25 How. (N. Y.) Pr. 403; Kellogg *v.* Howell, 62 Barb. (N. Y.) 280; Thompson *v.* Mount, 1 Barb. (N. Y.) Ch. 607; Gould *v.* Libby, 24 How. (N. Y.) Pr. 440; Lefevre *v.* Laraway, 22 Barb. (N. Y.) 167; Eleventh Ward Sav. Bank *v.* Hay, 55 How. (N. Y.) Pr. 444; Henderson *v.* Lowry, 5 Yerg. (Tenn.) 240; Strong *v.* Catton, 1 Wis. 471; Hill *v.* Hoover, 5 Wis. 354; Warren *v.* Foreman, 19 Wis. 35; Mahone *v.* Williams, 39 Ala. 202; Littell *v.* Zuntz, 2 Ala. 256; West *v.* Davis, 4 McLean, 241; Benton *v.* Shreeve, 4 Ind. 66; Boyd *v.* Hudson City Academical Soc. 24 N. J. Eq. 349. In Kneeland *v.* Smith, 13 Wis. 591, the court refused to set aside a sale fairly made and confirmed, on a mere offer to bid $8,000, where the former bid was $7,601; and so in Allis *v.* Sabin, 17 Wis. 626, where there was an offer to bid $2,400, on a resale of premises, which at the former sale were bid in for $2,000.

[6] King *v.* Platt, 37 N. Y. 155; Kellogg *v.* Howell, *supra.*

[7] Murdock *v.* Empie, 9 Abb. (N. Y.) Pr. 283. The conditions imposed in this case were the return of the deposit and

closure of a first mortgage for $10,000, property worth $14,000 was sold to the first mortgagee for the amount of his mortgage, and the second mortgagee alleged that he refrained from bidding on account of the representations of the first mortgagee, and also of a third person, as to the amount each would bid for the property. The petitioner was required to give security to obtain a bid of $13,000, and to reimburse the purchaser for actual betterments made and taxes paid since the sale, with interest, before applying any of the proceeds of the sale to the second mortgage.[1]

A resale should not be granted on the ground of inadequacy of price when the property, which was not worth on the day of sale more than $40,000, was bid in by the mortgagee for $35,000, the mortgagor having notice that he would not bid above that sum.[2]

1671. When the complainant himself becomes the purchaser, the court is always more ready to open a sale than where the property has been purchased by a stranger to the suit for the purpose of investment; the sale is set aside upon less evidence of fraud, surprise, or accident, or of the invalidating circumstance, whatever it may be.[3]

1672. Neglect of officer selling. — The parties interested in the property have a right to expect that it will be sold in the usual manner, and in a way to produce a fair competition at the sale. They will not be relieved against their own negligence, however inadequate may be the price obtained, unless it be so great as to show fraud or unfairness in the sale. But relief may be had if the property was sacrificed by the neglect or mistake of the master or officer conducting the sale,[4] as, for instance, in selling the whole premises together, when he should have sold in separate parcels.[5] The fact that a sale was made in the city of

the payment of the expenses, including the auctioneer's fees, and $100 for fees in examining the title; and furthermore the giving of a bond with sureties to bid a certain sum at the resale, and to pay the expenses of it.

[1] Dawson *v.* Drake, 29 N. J. Eq. 383.

[2] White *v.* Coulter, 1 Hun (N. Y.), 357.

[3] Tripp *v.* Cook, 26 Wend. (N. Y.) 143; Gould *v.* Libby, 24 How. (N. Y.) Pr. 440; Kellogg *v.* Howell, 62 Barb. (N. Y.) 280; Mott *v.* Walkley, 3 Edw. (N. Y.) 590. See, also, Cain *v.* Gimon, 36 Ala. 168.

[4] Marsh *v.* Ridgway, 18 Abb. (N. Y.) Pr. 262; Griffith *v.* Hadley, 10 Bosw. (N. Y.) 587; Minnesota Co. *v.* St. Paul Co. 2 Wall. 609.

[5] Am. Ins. Co. *v.* Oakley, 9 Paige (N. Y.), 259; Wolcott *v.* Schenck, 23 How. (N. Y.) Pr. 385. See Whitbeck *v.* Rowe, 25 How. (N. Y.) Pr. 403.

New York upon the day of the charter election, though not for that reason void, yet, taken in connection with the circumstances that a party interested in obtaining the best price possible for the property objected to the sale on that day, and made reasonable requests for a postponement, and for a sale in a particular manner, was held to justify the court in setting aside the sale, and ordering the premises sold again.[1]

If a master has violated his instructions limiting the price of the property, of which the purchaser had notice, the sale will be set aside.[2] So if a referee sell on terms not authorized by the decree, a resale will be ordered;[3] or if the master give the impression to parties in interest that the sale will not take place and they in consequence do not attend;[4] or if a commissioner appointed to make the sale does not pursue the instructions of the court in respect to advertising the sale;[5] or if a receiver sells several distinct parcels of land, greatly exceeding in value the debt, in one mass, to the prejudice of the debtor;[6] or if the officer requires payment of the whole amount of the purchase money within an hour after the sale;[7] or if he sell a lot not equitably liable for the debt.[8]

But the neglect of a master to give to a person interested in the foreclosure actual personal notice of the day of sale in accordance with a promise to do so, is not such an official delinquency as would justify setting aside the sale.[9]

1673. Upon an application for a resale the rights of the purchaser will be taken into account, and will prevail when the sale has been fair and free from fraud, or other circumstances, which give an undoubted right to have it set aside.[10] There must be a good reason for disturbing the sale; and when there is no legal right to relief, and the application is addressed merely to the

[1] King *v.* Platt, 37 N. Y. 155; 35 How. Pr. 23; 3 Abb. Pr. N. S. 434.

[2] Requa *v.* Rea, 2 Paige (N. Y.), 339. The limit of price was $2,600 and the master sold for $1,000.

[3] Hotchkiss *v.* Clifton Air Cure, 4 Keyes (N. Y.), 170.

[4] Collier *v.* Whipple, 13 Wend. (N. Y.) 224.

[5] Vanbussum *v.* Maloney, 2 Metc. (Ky.) 550; Denning *v.* Smith, 3 Johns. (N. Y.) Ch. 332.

[6] Griffith *v.* Hadley, 10 Bosw. (N. Y.) 587; and see Wolcott *v.* Schenck, 23 How. (N. Y.) Pr. 385; Arnold *v.* Gaff, 58 Ind. 543.

[7] Goldsmith *v.* Osborne, 1 Edw. (N. Y.) 560.

[8] Breese *v.* Busby, 13 How. (N. Y.) 485.

[9] Crumpton *v.* Baldwin, 42 Ill. 165.

[10] Gardiner *v.* Schermerhorn, Clarke (N. Y.), 102.

discretion of the court, the court will consider the equities of all the parties, to the end of giving substantial justice.[1]

It is no good cause for setting aside a foreclosure sale that it was advertised in a newspaper of small circulation;[2] or that the master has failed to report the sale at the next term of the court.[3] Nor that the judgment was entered for too large an amount;[4] for the court cannot inquire whether the judgment was too large or too small, or investigate the proceedings in the suit prior to the decree, upon an application to set aside a foreclosure sale;[5] nor that the original mortgagee who had assigned the mortgage and guaranteed the payment of it, but was a party to the foreclosure suit, did not know of the time and place of sale, for he was bound to use due diligence in obtaining this information, if he wished to protect his interests;[6] nor that a party to the suit was too blind to read the newspapers and had no notice of the sale, and the property sold for much less than its value.[7]

A sale should not be set aside on account of a mere irregularity in the sale, as in selling the homestead together with other premises, without inquiring whether the other lands cannot first be sold separately, unless it be shown that injury was done by such irregularity.[8] A sale on a decree of foreclosure cannot be impeached collaterally for any irregularity in the proceedings;[9] or because the decree was prematurely entered;[10] or because the mortgage was not duly executed.[11]

1674. Waived by delay. — Any irregularity in a sale which renders it voidable will be deemed to be waived, if it is not taken advantage of within a reasonable time and before innocent parties acquire rights.[12] After a delay of seven or eight years, the court

[1] Wiley *v.* Angel, Clarke (N. Y.), 217; Tripp *v.* Cook, 26 Wend. (N. Y.) 143; Cole *v.* Miller, 60 Ind. 463.

[2] Wake *v.* Hart, 12 How. (N. Y.) Pr. 444.

[3] Walker *v.* Schum, 42 Ill. 462.

[4] Young *v.* Bloomer, 22 How. (N. Y.) Pr. 383.

[5] Bullard *v.* Green, 10 Mich. 268.

[6] McCotter, *v.* Jay, 30 N. Y. 80.

[7] Parkhurst *v.* Cory, 11 N. J. Eq. (3 Stock.) 233.

[8] Lloyd *v.* Frank, 30 Wis. 306.

[9] Nagle *v.* Macy, 9 Cal. 426.

[10] Alderson *v.* Bell, 9 Cal. 315.

[11] Hayes *v.* Shattuck, 21 Cal. 51.

[12] Rigney *v.* Small, 60 Ill. 416. In this case the mortgagor waited nine years before bringing his bill to redeem. In Hamilton *v.* Lubukee, 51 Ill. 415, it was held that a mortgagor, after delaying four years from the time he had knowledge of the sale and proceedings under it, could not redeem as against remote purchasers, on the ground of defective notice of the sale and inadequacy of price. See McMurray *v.* McMurray, 66 N. Y. 175.

declined to inquire whether the price bid was adequate, or whether the property should have been sold in smaller quantities.[1] After a delay beyond the period prescribed by statute, within which an action to redeem the mortgage can be brought, the court has no power to set aside the sale.[2]

A mortgagor, by inducing a person to purchase the certificate under a foreclosure sale, upon the representation that he had no title to the premises, the time of redemption having expired, is thereby estopped from afterwards questioning the regularity of the foreclosure and sale, as against such purchaser.[3]

1675. When mistake or accident on the part of any one interested in the property is relied upon as a ground for setting aside a sale, it must be shown that the consequence of it was that the property sold for a less price than it would otherwise have sold for, and that a material advance may be expected on a resale.[4] Particular emphasis is placed in such cases upon the amount of the advance that can be obtained, the sale having been fairly conducted.[5] When the principal defendants were prevented by unavoidable accident from reaching the place of sale until after it had been concluded, the court in granting a resale imposed as terms, the deposit of the amount proposed to be bid, and the payment of the costs of the former sale.[6]

A mistake in the proceedings, such, for instance, as a misdescription in the bill of the land mortgaged, when first discovered after decree and sale, is ground for setting aside the decree and sale either wholly or as to the land erroneously described, and for maintaining a bill of review to correct the error.

1676. A sale will not be set aside without some pressing reason. If the mortgagor is competent to take care of his interests, and has the opportunity of attending the sale, and this is fairly conducted the court will not interfere.[7] A resale will not be granted, even at the instance of infant defendants, on account of the failure of their guardian to attend the sale, unless it appears

[1] Roberts *v.* Fleming, 53 Ill. 196.

[2] Depew *v.* Dewey, 46 How. (N. Y.) Pr. 441.

[3] Curyea *v.* Berry, 84 Ill. 600.

[4] Stryker *v.* Storm, 1 Abb. (N. Y.) Pr. N. S. 424. See, also, Hey *v.* Schooley, 7 Ohio, 373.

[5] Hudgins *v.* Lanier, 23 Gratt. (Va.) 494. For cases in which the court refused to set aside a sale for surprise, see Hunt *v.* Ellison, 32 Ala. 173; Hill *v.* Hoover, 5 Wis. 354.

[6] Adams *v.* Haskell, 10 Wis. 123.

[7] Haines *v.* Taylor, 3 How. (N. Y.) Pr. 206.

that their share of the proceeds, after indemnifying the purchaser at the first sale, will be materially increased by a sale fairly conducted in all respects.[1] A resale will not be ordered in favor of a party to the suit who has been negligent or inattentive, and made no inquiry in relation to the sale, or the time of it.[2] But if a mortgagor is prevented without negligence on his part from taking care of his interests, as by his illness, which the purchaser took advantage of by preventing a postponement of the sale and purchasing for one third of the real value;[3] or being absent from the state, his agent in charge of the property became insane;[4] or having appealed from the decree and supposing the sale was stayed, the plaintiff without his knowledge proceeds to sell;[5] or a subsequent incumbrancer is prevented from attending the sale by accident, and the premises are sold for an inadequate price; in all these cases the sale will be set aside.[6]

If the mortgagor or others interested in the property have been misled by the mortgagee, or even by a third person, in reference to the foreclosure, and in consequence did not attend the sale, and the property was bought by the mortgagee for a price greatly less than its value, a resale will be granted.[7] The petitioner may properly be required to guarantee a bid of a certain sum at the resale.[8] A resale was granted where a party to the suit persuaded the plaintiff to withdraw his consent to a postponement of the sale, knowing that the mortgagor was sick and unable to attend, and himself became the purchaser at a price wholly inadequate.[9] A sale will be set aside whenever the debtor has been misled in any way by the mortgagee or the purchaser, and thereby prevented from protecting his interests at the sale, and the property has been sold greatly below its value.[10]

1677. Few bidders. — It is no good cause for setting aside a judicial sale, that only a few bidders were present. If the terms

[1] Stryker *v.* Storm, 1 Abb. (N. Y.) Pr. N. S. 424. The guardian was kept from the sale by delay of the railway train by which he was to go to the place of sale.

[2] Francis *v.* Church, 1 Clark (N. Y.), 475.

[3] May *v.* May, 11 Paige (N. Y.), 201; Billington *v.* Forbes, 10 Paige (N. Y.), 487.

[4] Thompson *v.* Mount, 1 Barb. (N. Y.) Ch. 607.

[5] Gould *v.* Libby, 24 How. (N. Y.) Pr. 440; S. C. 18 Abb. Pr. 32.

[6] Howell *v.* Hester, 4 N. J. Eq. (3 Green) 266.

[7] Campbell *v.* Gardner, 11 N. J. Eq. (3 Stock.) 423.

[8] Hazard *v.* Hodges, 17 N. J. Eq. 123.

[9] Billington *v.* Forbes, 10 Paige (N. Y.), 487.

[10] Collier *v.* Whipple, 13 Wend. (N. Y.) 226; Hoppock *v.* Conklin, 4 Sandf. (N. Y.) Ch. 582.

of the decree have been pursued, and the property sold for an adequate price, the sale must stand. But a sale at which no bidders were present except the auctioneer, who bid in the property for the mortgagee, was held void.[1] And so without determining whether the price obtained at a sale was adequate the court set it aside on its appearing that only one bidder was present, and that others intending to be present and to bid for a part of the land were deterred from doing so by the inclemency of the weather.[2]

1678. When a foreclosure sale is invalid by reason that in making it the requirements of statute have not been followed, the purchaser is subrogated to the rights of the mortgagee. When the proper parties to the suit are omitted, and therefore are not bound by it, or there is any other irregularity in the proceedings, the sale operates as a voluntary assignment by the mortgagee of his interest to the purchase.[3] This is true of sales under powers of sale,[4] as well as those under decrees of court. Such purchaser also acquires the mortgagee's rights to recover from the mortgagor, or others personally liable for the debt, any deficiency there may be after the application of the proceeds of the property. In such cases the purchaser may use his mortgage title to protect himself in the possession of the property if he has obtained this;[5] the mortgagor cannot maintain ejectment against him any more than he could against the mortgagee lawfully in possession after condition broken.[6] The purchaser's title under an invalid sale is good against all except the mortgagor and those claiming under him.[7]

1679. A second action to foreclose. — If the owner of the equity has, through mistake, not been made a party, the mortgagee who has purchased at the sale may maintain a second action to foreclose the equity of such owner, and for a new sale, but

[1] Campbell *v.* Swan, 48 Barb. (N. Y.) 109.

[2] Roberts *v.* Roberts, 13 Gratt. (Va.) 639.

[3] Robinson *v.* Ryan, 25 N. Y. 320; Grapengether *v.* Fejervary, 9 Iowa, 163; Honaker *v.* Shough, 55 Mo. 472; Stoney *v.* Shultz, 1 Hill (S. C.), 405; Cheek *v.* Waldrum, 25 Ala. 152; Stark *v.* Brown, 12 Wis. 572; Moore *v.* Cord, 14 Wis. 213; Childs *v.* Childs, 10 Ohio St. 339; Frische *v.* Kramer, 16 Ohio, 125.

[4] Grosvenor *v.* Day, 1 Clarke (N. Y.), 109; Jackson *v.* Bowen, 7 Cow. (N. Y.) 13; Gilbert *v.* Cooley, Walk. (Mich.) 494. See chapter xl.

[5] Honaker *v.* Shough, 55 Mo. 472; Jones *v.* Mack, 53 Mo. 147; Jackson *v.* Magruder, 51 Mo. 55.

[6] Gillett *v.* Eaton, 6 Wis. 30; Tallman *v.* Ely, 6 Wis. 244.

[7] Casler *v.* Shipman, 35 N. Y. 533.

he cannot recover the costs of the previous sale.[1] The foreclosure is valid as against those who were made parties to the proceeding; and if the error was in not making a junior mortgagee a party, the purchaser acquires an estate subject only to the lien of the junior mortgagee;[2] and the purchaser may maintain proceedings to foreclose such lien.[3] By the act of purchase he submits himself to the jurisdiction of the court in the foreclosure suit as to all matters connected with the sale, and he is entitled to apply for relief such as the facts may justify. He may, by a supplemental bill, bring in all persons interested in the premises whose rights are not already foreclosed; or if necessary he may have the sale set aside and obtain a resale of the premises; or the court may give such other relief as justice demands.[4]

1680. Redemption in such case can only be effected by satisfying the prior mortgage. It is not sufficient to pay the amount for which the property was bid off at the sale, where this amount is less than the mortgage debt; and this rule applies as well in those states where a mortgage is regarded as a mere lien, as where the common law doctrine still prevails that the mortgage is the legal estate. Although the mortgage be regarded only as a lien for enforcing the debt, the mortgagee is just as much entitled to payment, and his lien is not merged or lost in the judgment of foreclosure and sale.[5]

If before the sale is set aside the purchaser has sold the property or any part of it to another, who has taken it in good faith, for value, and without notice, such sale will not be affected by the action of the court and the resale under its authority. But the court will inquire into the circumstances of the purchaser's sale, and if any collusion be found, or any facts from which notice should be inferred, the title will be made void as effectually as if it had been retained in the first purchaser.[6] Judgments against the first purchaser after the delivery of the deed to him, being merely liens upon his interest, cease to incumber it on the sale being set aside.[7]

[1] State Bank of Wisconsin *v.* Abbott, 20 Wis. 570; and see Stackpole *v.* Robbins, 47 Barb. (N. Y.) 212.

[2] Carpentier *v.* Brenham, 40 Cal. 221.

[3] Goodenow *v.* Ewer, 16 Cal. 461.

[4] Boggs *v.* Hargrave, 16 Cal. 559; Goodenow *v.* Ewer, *supra.*

[5] Johnson *v.* Harmon, 19 Iowa, 56; Knowles *v.* Rablin, 20 Iowa, 101; Street *v.* Beal, 16 Iowa, 68; Massie *v.* Wilson, 16 Iowa, 390; Douglass *v.* Bishop, 27 Iowa, 214.

[6] Colby *v.* Rowley, 4 Abb. (N. Y.) Pr. 361.

[7] Colby *v.* Rowley, *supra.*

Intervening purchasers and mortgagees may be protected by providing that the money received from the resale of the property shall be held and not distributed, until the further order of the court, to the end that it may be applied so far as necessary to the repayment of the moneys advanced by them in good faith on the property.[1]

One who has purchased of the vendee at the foreclosure sale, during the pendency of a motion to set the sale aside, is not entitled to protection.[2]

1681. When a sale is set aside by order of court the title of the purchaser is vacated,[3] and the mortgage is restored to the same position it occupied before the proceedings were commenced, without any affirmative judgment of the court. The mortgage cannot be deemed to be paid, or the lien upon the premises in any way impaired.[4] The purchaser also is entitled to be put into the same situation he was before the purchase.[5] If the sale be set aside, a purchaser who has entered into possession is held to account for the rents and profits received by him while in possession for the benefit of the mortgagor or owner of the equity.[6] In like manner, in case a person interested in the property was not made a party to the suit, and consequently redeems it after the sale, the purchaser becomes liable to account for the rents and profits; and he is under the same liability in case he forecloses the outstanding incumbrance by another suit. He acquires by the sale in such case only the rights of a mortgagee in possession.[7]

[1] Gould *v.* Libby, 18 Abb. (N. Y.) Pr. 32; 24 How. Pr. 440.

[2] Quaw *v.* Lameraux, 36 Wis. 626.

[3] Freeman *v.* Munns, 15 Abb. (N. Y.) Pr. 468.

[4] Stackpole *v.* Robbins, 47 Barb. (N. Y.) 212; affirmed 48 N. Y. 665.

[5] Trotter *v.* White, 26 Miss. 88.

[6] Raun *v.* Reynolds, 15 Cal. 459.

[7] Walsh *v.* Rutgers Fire Ins. Co. 13 Abb. (N. Y.) Pr. 33.

CHAPTER XXXVII.

APPLICATION OF PROCEEDS OF SALE.

I. Payment of the mortgage debt, 1682, 1683.
II. Disposition of the surplus, 1684–1698.
III. Priorities, between holders of several notes secured, 1699–1707.
IV. Costs of subsequent mortgagees, 1708.

1. *Payment of the Mortgage Debt.*

1682. In general. — The proceeds of the sale must be disposed of as directed in the decree of court, or by the rules and practice adopted by it. In general it may be said that the officer making the sale is first to pay out of the proceeds of it to the plaintiff or his attorney the amount of the mortgage debt with interest, and the costs of the proceedings. He should take a receipt for this to file in court with his report of the sale. But the court, and not the officer appointed to make the sale, must determine all questions of priority of claim to the proceeds, and must see that the moneys reach the persons entitled to them.[1]

1683. If a mortgagee in order to preserve his security has been obliged to pay taxes or other charges upon the mortgaged property, he may add the amount to his mortgage upon foreclosure of it.[2] A prior judgment lien,[3] or rent due on leasehold premises,[4] or a prior mortgage that is due and payable,[5] if it be a lien upon the same premises, may be paid by the junior mortgagee, and he will succeed by subrogation to the rights of such prior party without any assignment or transfer of the prior claim to him. In such cases the mortgagee, on a bill to foreclose, is entitled to be reimbursed the sum he has paid, and to have a decree of indemnity out of the proceeds of the sale.[6]

[1] Eleventh Ward Sav. Bank *v.* Hay, 55 How. (N. Y.) Pr. 444.

[2] See § 1137; Dale *v.* M'Evers, 2 Cow. (N. Y.) 118; Burr *v.* Veeder, 3 Wend. (N. Y.) 412; Faure *v.* Winans, Hop. (N. Y.) Ch. 283.

[3] Silver Lake Bank *v.* North, 4 Johns. (N. Y.) Ch. 370.

[4] Robinson *v.* Ryan, 25 N. Y. 320.

[5] Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35.

[6] Ellsworth *v.* Lockwood, 42 N. Y. 89, 96; Dale *v.* M'Evers, *supra*.

The taxes and assessments due on the property sold, if unpaid, are to be deducted from the moneys arising from the sale, unless it was made subject to them; but a direction to the officer in the judgment to so deduct the amount of them does not authorize the payment of them by him.[1]

But except when the mortgagee has paid prior liens, the proceeds of lands sold under a mortgage are applicable only to the mortgage debt, and after that to subsequent liens and incumbrances, and not to prior and paramount liens.[2]

2. *Disposition of the Surplus.*

1684. Usually the surplus money is paid into court to await its order of distribution.[3] Any party to the suit having a lien upon the premises subordinate to the mortgage upon which the sale was made may file a notice, or petition, stating the nature and extent of his claim, and he may, according to the general practice, have an order of reference to ascertain and report the amount due to him, and to others having liens upon the property. Notice of this is given to all claimants or others having liens, and the referee proceeds to ascertain the amounts due to each. The court has power to distribute the surplus among the persons entitled, although the mortgagor has died pending the proceedings, and his estate is in course of settlement in the probate or surrogate court. His heirs and creditors must apply for it there.[4]

1685. The court may appoint a master or referee to ascertain the rights of claimants to the surplus, and may confirm or set aside or refer back his report, or may, while the moneys remain in court, vacate the report and order further proof.[5] According to the practice of some courts this reference is allowed as a matter of course; while the practice of others is to allow it on application.[6]

All parties to the foreclosure suit should have notice of the application for the surplus money, that they may appear and assert their rights, and the report should show on its face that they were summoned; and an order of payment without such notice will be

[1] See § 1597; Opdyke *v.* Crawford, 19 Kans. 604; Cord *v.* Southwell, 15 Wis. 211.

[2] Reybold *v.* Herdman, 2 Del. Ch. 34.

[3] Clark *v.* Carnall, 18 Ark. 209.

[4] Loucks *v.* Van Allen, 11 Abb. (N. Y.) Pr. N. S. 427.

[5] Mut. Life Ins. Co. of N. Y. *v.* Salem, 3 Hun (N. Y.), 117.

[6] Ward *v.* Montclair R. R. Co. 26 N. J. Eq. 260.

set aside.[1] They should prove the nature of their respective liens and the amounts due them; verifying them in the same manner as creditors coming in under a decree are required to do in court.[2] The costs and expenses of proceedings for the distribution of the surplus are properly chargeable to the fund.[3] A creditor who was not a party to the suit generally bears the expense of proving his own claim; and the court may refuse a creditor his costs under other circumstances.[4]

1686. Upon the filing of the report of the referee exceptions may be taken to his findings of facts, and his conclusions upon them, and upon notice to the parties interested a hearing may be had; but, generally, if exceptions are not taken within a specified time after the filing of the report, the report stands confirmed. An order of distribution follows, directing the payment of the moneys in accordance with the report when no exception has been taken to this, or otherwise in accordance with the determination of court upon the report. No payment can properly be made without such final order of court.[5]

1687. In general no claim which has not become an absolute lien upon the property can be considered, however equitable it may be.[6] Mechanics' liens, though not established by judgment,[7] and judgment liens, though not perfected by execution, are transferred from the land to the surplus money. After a sale upon execution under a judgment junior to the mortgage, the right of redemption not having expired at the time of the foreclosure sale, the general lien of the judgment is turned into a specific lien upon the surplus to the extent of the purchaser's bid and interest thereon.[8] If the purchaser's title has become complete at the time of the foreclosure sale, so that he is entitled to a deed, he is entitled to the whole surplus.[9] The claimant, what-

[1] Franklin *v.* Van Cott, 11 Paige (N. Y.), 129; Smith *v.* Smith, 13 Mich. 258.

[2] Hulbert *v.* McKay, 8 Paige (N. Y.), 651.

[3] Harvey *v.* Harvey, 6 Mad. 91; Oppenheimer *v.* Walker, 3 Hun (N. Y.), 30.

[4] Abell *v.* Screech, 10 Ves. 355, 359.

[5] *Exp.* Allen, 2 N. J. Eq. (1 Green) 388; Franklin *v.* Van Cott, 11 Paige (N. Y.), 129.

[6] Husted *v.* Dakin, 17 Abb. (N. Y.) Pr. 137; King *v.* West, 10 How. (N. Y.) Pr. 333; Mut. Life Ins. Co. of N. Y. *v.* Bowen, 47 Barb. (N. Y.) 618.

[7] Livingston *v.* Mildrum, 19 N. Y. 440. A judgment creditor, who was properly made a party to the suit, does not lose his right to share in the surplus by the fact that his judgment became dormant pending the action. Dempsey *v.* Bush, 18 Ohio St. 376. See §§ **1934, 1935.**

[8] Snyder *v.* Stafford, 11 Paige (N. Y.), 71; Clarkson *v.* Skidmore, 46 N. Y. 297.

[9] See § **1934.**

ever his lien may be, is not entitled to any part of the surplus money arising from the sale unless he was a party to the suit; for otherwise his lien is not affected by the proceedings, and the land is not discharged from it by the sale and transferred to the money;[1] unless, however, he files a cross-bill, or voluntarily appears in the original suit and establishes his claim.[2] When the subsequent lien-holders have been made parties to the suit, the decree of sale may properly direct the payment of any surplus, after satisfying the mortgage, among the lien creditors, according to their respective rights and equities; and no cross-bill is necessary for the purpose.[3] It is not necessary that the decree should find the precise amount due such lien-holder, if it finds that there is due him more than the surplus.[4]

The proceeds of the sale after satisfying the mortgage debt may be said, in general, to stand in place of the equity of redemption to those who had title or right in that or lien upon it.[5] If the mortgagor or his vendee be the only ones interested in it, the surplus belongs wholly to him. If he has died and his heirs are made parties to the suit, the surplus goes to them;[6] although it is held in some cases that the personal representatives are entitled to be heard on the petition for the surplus, on the ground that it is personalty.[7]

1688. When there are several liens upon the premises, the surplus money must be applied to their discharge in the order of their priority.[8] Generally a priority of right may be presumed from a priority of record. This presumption will prevail between the holders of several mortgages upon the property; and to overcome this presumption the burden of proof is upon the holder of a junior mortgage to overcome it by positive evidence of prior right.[9] Questions of priority between persons having claims upon the equity of redemption are properly settled after the sale, upon their application for the surplus after it has been brought into court, rather than by a stay of proceedings on the execution of

[1] Winslow *v.* McCall, 32 Barb. (N. Y.) 241; Root *v.* Wheeler, 12 Abb. (N. Y.) Pr. 294.

[2] Ellis *v.* Southwell, 29 Ill. 549.

[3] Crocker *v.* Lowenthal, 83 Ill. 579.

[4] Walker *v.* Abt, 83 Ill. 226.

[5] Habersham *v.* Bond, 2 Ga. Dec. 46.

[6] Shaw *v.* Hoadley, 8 Blackf. (Ind.) 165.

[7] Smith *v.* Smith, 13 Mich. 258.

[8] Averill *v.* Loucks, 6 Barb. (N. Y.) 470; Lithauer *v.* Royle, 17 N. J. Eq. 40.

[9] Freeman *v.* Schroeder, 43 Barb. (N. Y.) 618; Peabody *v.* Roberts, 47 Barb. (N. Y.) 91; People *v.* Bergen, 53 N. Y. 404; 15 Abb. Pr. 97.

the order of sale.[1] Until it is ascertained that there will be a surplus, they are not permitted to litigate their claims between themselves.[2]

1689. So if there be simultaneous mortgages upon the same land, they are in effect one instrument, and upon the foreclosure of one of them, the surplus remaining after satisfying that is applicable to the payment of the other, although only part of it is due.[3] When such mortgages are held by different persons, the money arising from the sale of the property should be equitably divided between the mortgagees;[4] the fact that one was recorded before the other does not matter, if both mortgages were made under an agreement made by the mortgagor at the same time with both mortgagees.[5]

1690. The complainant himself may present and establish a claim to the surplus moneys by reason of another debt due him from the mortgagor. The validity and amount of this may be ascertained upon a reference, in the same manner as when a claim is presented by any other person;[6] and there is no obligation upon him to establish his claim beforehand.[7]

A junior mortgagee, who is a party to the suit, may have his rights protected by an appropriate decree as to the application of the surplus, if there be any after satisfying the prior mortgage.[8] He should, however, appear and ask for payment out of the surplus.[9]

1691. The equities of subsequent incumbrancers of part of the premises are to be regarded. — In general it may be said that the same equities which govern the order of sale of property subject to other liens, or accompanied by other security in the hands of the mortgagee,[10] apply also to the distribution of the proceeds of sales under like circumstances. If the mortgage, under the circumstances of the case, is a charge upon all the land covered by the mortgage, and only a part of it is foreclosed, the proceeds must be applied to the discharge of a proportional part

[1] Schenck *v.* Conover, 13 N. J. Eq. (2 Beas.) 31.

[2] Union Ins. Co. *v.* Van Rensselaer, 4 Paige (N. Y.), 85.

[3] Barber *v.* Cary, 11 Barb. (N. Y.) 549.

[4] Eleventh Ward Sav. Bank *v.* Hay, 55 How. (N. Y.) Pr. 444.

[5] Daggett *v.* Rankin, 31 Cal. 321.

[6] Beekman Fire Ins. Co. *v.* First M. E. Church in N. Y. 29 Barb. (N. Y.) 658; Field *v.* Hawxhurst, 9 How. (N. Y.) Pr. 75.

[7] Field *v.* Hawxhurst, *supra.*

[8] Ward *v.* McNaughton, 43 Cal. 159.

[9] Kenton *v.* Spencer, 6 Ind. 321.

[10] See chapter xxxvi.

only of the debt, and the balance to the persons having incumbrances upon that part in their order.[1]

1692. A prior unrecorded mortgage is preferred to a subsequent judgment, if there was no fraudulent intent on the part of the mortgagee in withholding the mortgage from record, although it was given to secure future advances or liabilities.[2] It is also held that a mortgage which is equitable only, not being formally executed, is preferred to a subsequent judgment if given for a present consideration.[3]

1693. Dower and homestead in surplus. — A widow who has joined her husband in a mortgage of land of which he was seised is in equity entitled to dower in surplus moneys arising from a foreclosure sale of the property, after satisfying the mortgage debt. To the extent of the debt secured by the mortgage in which she released her right her dower interest is extinguished, and she is dowable only of the surplus.[4] If her husband die after the judicial sale and the distribution of the surplus, of course she cannot claim any interest in it; but if he die after the sale and while the surplus, or even a part of it, is within the control of the court, she is dowable of the surplus so far as her right can be equitably paid from the portion remaining.[5] If, however, some of those interested in the surplus have received their portions before her claim was made, they cannot be called upon to refund, nor can the others who have not received their shares be called upon to suffer loss by reason of the payments made. She is in such case dowable only of the surplus remaining undistributed, and not of the whole surplus.[6]

Even after the surplus had been paid under order of the court to an assignee of the mortgagor, the widow who had neglected to

[1] Mickle *v.* Rambo, 1 N. J. Eq. (Sax.) 501. See, also, Frost *v.* Peacock, 4 Edw. (N. Y.) 678.

[2] See §§ **460, 461**; Thomas *v.* Kelsey, 30 Barb. (N. Y.) 268.

[3] See § **470.**

[4] See § **666**; Fox *v.* Pratt, 27 Ohio St. 512; Culver *v.* Harper, 27 Ohio St. 464; State Bank of Ohio *v.* Hinton, 21 Ohio St. 509; Taylor *v.* Fowler, 18 Ohio, 567; Rands *v.* Kendall, 15 Ohio, 671; Hinchman *v.* Stiles, 1 Stockt. (N. J.) 454; Matthews *v.* Duryee, 45 Barb. (N. Y.) 69; 17 Abb. Pr. 256; Titus *v.* Neilson, 5 Johns. (N. Y.) Ch. 452; Hawley *v.* Bradford, 9 Paige (N. Y.), 200; Bell *v.* Mayor of N. Y. 10 Paige (N. Y.), 49; Blydenburgh *v.* Northrop, 13 How. (N. Y.) Pr. 289.

[5] Pickett *v.* Buckner, 45 Miss. 226. In England, prior to the statute of 3 & 4 Wm. 4, c. 105, a widow was not dowable of an equity of redemption, and of course she was not of the surplus after a foreclosure sale.

[6] State Bank of Ohio *v.* Hinton, 21 Ohio St. 509.

appear in the foreclosure suit, and was not notified of the reference respecting the distribution of the surplus, was allowed to maintain an action to recover her dower in the surplus against such assignee.[1]

When land is sold under a mortgage containing a waiver of homestead exemption, the mortgagor is entitled to the exemption out of the surplus as against subsequent judgment creditors.[2] And so when a right of homestead has been released in a mortgage, and this is foreclosed against the widow and heirs of the mortgagor, and there be a surplus, this is payable to the widow to the extent of the homestead exemption.[3]

1694. Inchoate right of dower. — In some cases the courts have gone so far as to protect the inchoate interest of the wife during coverture in the surplus arising from a mortgage sale, by permitting her, as against judgment creditors, to have one third of the residue invested for her benefit, and kept invested during the joint lives of herself and her husband, and the interest paid to her during her own life, in case of her surviving her husband.[4] But it would seem doubtful whether a court of equity, in the exercise of its ordinary jurisdiction, has the power to enforce such a doctrine;[5] and the authority is against allowing the wife any such right against her husband's creditors.[6]

1695. The surplus of a sale made after the death of the mortgagor is real estate, though personal if the sale is made in his lifetime.[7] A devise of the property in trust to pay debts does not make personal assets of the surplus.[8] The rule in Massachusetts is, however, different. The legal title to the proceeds of such sale is held to be in the executor or administrator, by force of the contract of mortgage, though when he has collected the money he holds it in trust for the heirs or devisees, as the case may be.[9]

[1] Matthews *v.* Duryee, 45 Barb. (N. Y.) 69. Sutherland, J., dissented, saying: "If the plaintiff has any remedy, it appears to me that it must be by a motion or proceeding to vacate or modify the order under which the money was paid to the defendant."

[2] Quinn's Appeal, 86 Pa. St. 447; Hill *v.* Johnston, 29 Pa. St. 362.

[3] McTaggart *v.* Smith, 14 Bush (Ky.), —; 7 Reporter, 369.

[4] § 1933; Denton *v.* Nanny, 8 Barb. (N. Y.) 618; Vreeland *v.* Jacobus, 19 N. J. Eq. 231. See, however, Riddick *v.* Walsh, 15 Mo. 519.

[5] Scribner on Dower, p. 480, § 30.

[6] Dean *v.* Phillips, 17 Ind. 406.

[7] Wright *v.* Rose, 2 Sim. & Stu. 323; Dunning *v.* Ocean Nat. Bank, 61 N. Y. 497, and cases cited.

[8] § 1931; Clay *v.* Willis, 1 B. & C. 364.

[9] Varnum *v.* Meserve, 8 Allen (Mass.),

1696. A lessee for years of the mortgagor is not entitled to any part of the surplus arising from the sale. The lease is extinguished by the foreclosure, and all title of the lessee is cut off. His only claim would be one against the mortgagor for a breach of the covenant for quiet enjoyment if the lease contained such a covenant.[1]

1697. An attachment of the proceeds of the foreclosure sale is subject to the claims of mortgagees or other incumbrancers of record.[2] If the mortgagor after the maturity of the mortgage be summoned as garnishee or trustee of the mortgagee, the latter cannot defeat the lien acquired by the attaching creditor by a subsequent assignment of the mortgage. If the assignee by such assignment foreclose the mortgage, the lien of the attaching creditor must be first satisfied.[3] It is said in this case that such creditor has the same right to enforce the mortgage that the mortgagee had.

1698. Upon a sale under a junior mortgage, a surplus belongs to the mortgagor, and is not applied to the satisfaction of a prior mortgage; for the equity of redemption which is sold belongs to the mortgagor, and the presumption of law is, that the purchaser of it only pays for it its worth in excess of the prior mortgage debt.[4] But sometimes the whole estate is sold under the decree of court or by consent of the parties interested, in which case the prior parties in interest may be made parties to the proceedings in relation to the distribution;[5] and a prior mortgagee who has been in possession must account for the rents and profits received by him.[6]

There may also be other circumstances under which equity will require the mortgagee, out of the money received by him on the sale applicable to the payment of his demand, to pay a prior in-

160. It may be observed that the contract in Wright *v.* Rose, 2 Sim. & Stu. 323, was also to pay the mortgagor, his "executors, or administrator," so that the cases are in conflict. Dwight, C., in Dunning *v.* Ocean Nat. Bank, 61 N. Y. 497, observes that "the true construction of these words undoubtedly is, that the promise is to pay the executors or administrators whenever it might have been collected by the mortgagor, as *e. g.* where the land was sold in his lifetime." See chapter xl, div. 16.

[1] Burr *v.* Stenton, 32 Barb. (N. Y.) 377; S. C. 43 N. Y. 462.

[2] West *v.* Shryer, 29 Ind. 624.

[3] Campbell *v.* Nesbitt, 7 Neb. 300.

[4] Western Ins. Co. *v.* Eagle Fire Ins. Co. 1 Paige (N. Y.), 284; Hanger *v.* The State, 27 Ark. 667.

[5] Porter *v.* Barclay, 18 Ohio St. 546; Dodge *v.* Silverthorn, 12 Wis. 644.

[6] Goring *v.* Shreve, 7 Dana (Ky.), 64.

cumbrance; as, for instance, where he has in the first place conveyed the land to the mortgagor with covenants against all incumbrances and taken back the mortgage for the purchase money, if there be a prior mortgage upon the property the proceeds will be applied in the first place to the discharge of that, and the amount so applied deducted from his claim under the mortgage.[1]

3. *Priorities between Holders of several Notes secured.*

1699. General rule. — It is the settled rule in many of the states that where a mortgage has been given to secure several notes falling due at various times, and the notes are assigned to different holders, the one first maturing is to be first paid out of the mortgaged property; the mortgage as to the several notes being equivalent to so many successive mortgages.[2] The rule rests upon the fact that the holder of the note first maturing may foreclose upon non-payment, without waiting for the succeeding notes to mature. The power to do so implies a priority of lien in the notes first falling due.[3]

1700. Payment of notes not due. — The surplus cannot be paid to the holder of the notes not due: courts do not make contracts for parties, nor require them to pay their debts before they have agreed to pay them. The prudent method in taking securities of this kind is to provide against all these contingencies by the express provisions of the deed. A court of equity will, however, save the holder of subsequent notes from the loss of his security through the payment of the surplus to the mortgagor, by

[1] Van Riper *v.* Williams, 2 N. J. Eq. (1 Green) 407. See § **1504**; also, Johnson *v.* Blydenburgh, 31 N. Y. 427; Stiger *v.* Bacon, 29 N. J. Eq. 442; Woodruff *v.* Depue, 14 N. J. Eq. 168; Union Nat. Bank of Rahway *v.* Pinner, 25 N. J. Eq. 495; Dayton *v.* Dusenbury, Ib. 110; White *v.* Stretch, 22 N. J. Eq. 76.

[2] See §§ **606, 1459, 1478, 1577, 1939**; Koester *v.* Burke, 81 Ill. 436; Gardner *v.* Diederichs, 41 Ill. 158; Sargent *v.* Howe, 21 Ill. 148; Funk *v.* McReynold, 33 Ill. 481; Vansant *v.* Allmon, 23 Ill. 30; Wood *v.* Trask, 7 Wis. 566; State Bank *v.* Tweedy, 8 Blackf. (Ind.) 447; Hough *v.* Osborne, 7 Ind. 140; Crouse *v.* Holman, 19 Ind. 30; Murdock *v.* Ford, 17 Ind. 52; Stanley *v.* Beatty, 4 Ind. 134; Davis *v.* Landgdale, 41 Ind. 399; Minor *v.* Hill, 58 Ind. 176; Richardson *v.* McKim, 20 Kans. 346; Gwathmeys *v.* Ragland, 1 Rand. (Va.), 466; McVay *v.* Bloodgood, 9 Porter (Ala.), 549; Hinds *v.* Mooers, 11 Iowa, 211; Massie *v.* Sharpe, 13 Iowa, 542; Hunt *v.* Stiles, 10 N. H. 466. *Contra*, Paris Exchange Bank *v.* Beard, 49 Tex. 358.

[3] Thompson *v.* Field, 38 Mo. 320; Mitchell *v.* Ladew, 36 Mo. 526; Ellis *v.* Lamme, 42 Mo. 153; Wilson *v.* Hayward, 6 Fla. 171; and see Chew *v.* Buchanan, 30 Md. 367, where the question was raised but not decided.

staying payment, and providing that it be held to meet the notes not due. "Independent of any legal and binding agreement, where a mortgage is executed to secure two or more notes maturing at different times, the proceeds arising from a foreclosure of the mortgaged premises should be applied to the payment of the notes in the order in which they fall due. The different instalments in a mortgage securing such notes are regarded as so many successive mortgages, each having priority according to the time of maturity; and where, instead of one mortgage being executed to secure several notes given for the same indebtedness, a separate mortgage is given to secure each note, the rights of the parties are identical." [1]

This legal effect of the mortgage cannot be varied or altered by parol testimony. But it would seem that when the mortgagee assigns the notes to different persons, he may by agreement with them fix their rights of priority in payment.[2]

1701. Priority of assignment. — It is held also that an assignee of the mortgage with part of the debt is entitled to payment in preference to the mortgagee, who retains one of the notes; [3] and that as between different assignees, priority of assignment gives preference. The equity arising from priority of assignment is generally regarded as paramount to the equity arising from the maturity of the notes as against the assignor; but as between different assignees the equity arising from maturity is paramount. Generally it may be said the effect of an assignment of one of the mortgage notes is to carry a *pro rata* interest in the security, subject to the paramount claim of notes previously due; [4] and to give no right based upon priority of assignment, except as against the assignor.[5]

The fact that an assignee of one of the mortgage notes has also

[1] Isett *v.* Lucas, 17 Iowa, 503; Bk. of the U. S. *v.* Covert, 13 Ohio, 240; State Bank *v.* Tweedy, 8 Blackf. 447; Grapengether *v.* Fejervary, 9 Iowa, 163; Sangster *v.* Love, 11 Iowa, 580; Reeder *v.* Carey, 13 Iowa, 274; Massie *v.* Sharpe, 13 Iowa, 542; Hinds *v.* Mooers, 11 Iowa, 211; Rankin *v.* Major, 9 Iowa, 297.

[2] Grattan *v.* Wiggins, 23 Cal. 16.

[3] § 822; Bryant *v.* Damon, 6 Gray (Mass.), 564; Warden *v.* Adams, 15 Mass. 233; Cullum *v.* Erwin, 4 Ala. 452; Salzman *v.* His Creditors, 2 Rob. (La.) 241; Van Rensselaer *v.* Stafford, 1 Hop. (N. Y.) Ch. 569; Clowes *v.* Dickenson, 5 Johns. (N. Y.) Ch. 235; Pattison *v.* Hull, 9 Cow. (N. Y.) 747; Mechanics' Bank *v.* Bank of Niagara, 9 Wend. (N. Y.) 410; Stevenson *v.* Black, Sax. Ch. (N. J.) 338.

[4] State Bank *v.* Tweedy, 8 Blackf. (Ind.) 447.

[5] Bank of the U. S. *v.* Covert, 13 Ohio, 240.

an assignment of the mortgage gives him no priority of right over the assignee of another note separate from the mortgage; but both are equally entitled to the benefit of the security.[1]

Where a holder of a mortgage assigns a part of it, although he warrants only the existence of the debt at the time of the transfer, it would be contrary to good faith to permit him, after receiving the money for this part of the claim, to come into competition with his assignee, if the property prove insufficient to pay the claims of both.[2] Unless the intention be plainly declared on the face of the assignment that the assignee is to share *pro rata* in the security with the assignor, the equitable construction of it is that it must in the first place be applied for the payment of the part of the debt which was assigned.[3] A proviso in the assignment, that it shall not be so construed as to prevent the mortgagee from receiving or disposing of the residue of the mortgage, does not entitle him to participate with the mortgagee in the proceeds of it when these are less than the debt.[4]

In some courts, however, the rule has been adopted that the proceeds of the mortgaged property should be divided, *pro rata*, among all the notes secured by the mortgage, without regard either to the times of their falling due, or the dates of their assignment, unless the assignment show a contrary intention.[5]

1702. It is competent, however, for the parties to change this general rule of law in respect to priority, by an express agreement in the deed that the note last falling due shall have priority of lien;[6] or by a subsequent agreement made between

[1] Waterman *v.* Hunt, 2 R. I. 298.

[2] Salzman *v.* His Creditors, 2 Rob. (La.) 241; Barkdull *v.* Herwig, 30 La. Ann. 618.

[3] Waterman *v.* Hunt, 2 R. I. 298; Bryant *v.* Damon, 6 Gray (Mass.), 564. See, also, Wright *v.* Parker, 2 Aik. (Vt.) 212; Richardson *v.* McKim, 20 Kans. 346.

[4] Merchants' Bank *v.* Bank of Niagara, 9 Wend. (N. Y.) 410.

[5] In **Maryland**: Chew *v.* Buchanan, 30 Md. 367, Bartol, C. J., dissenting; Dixon *v.* Clayville, 44 Md. 575.

In **Pennsylvania**: Donley *v.* Hays, 17 S. & R. 400, Gibson, C. J., dissenting; Betz *v.* Heebner, 1 Penn. 280; Hancock's Appeal, 34 Pa. St. 155.

In **Mississippi**: Parker *v.* Mercer, 6 How. 320; Cage *v.* Iler, 5 Sm. & M. 410; Henderson *v.* Herrod, 10 Sm. & M. 631; Jefferson College *v.* Prentiss, 29 Miss. 46; Bank of England *v.* Tarleton, 23 Miss. 173; Pugh *v.* Holt, 27 Miss. 461.

Tennessee: Ewing *v.* Arthur, 1 Humph. 537; Smith *v.* Cunningham, 2 Tenn. Ch. 569; Andrews *v.* Hobgood, 1 Lea (Tenn.), 693.

Michigan: English *v.* Carvey, 25 Mich. 178; McCurdy *v.* Clark, 27 Mich. 445; Wilcox *v.* Allen, 36 Mich. 160.

California: Phelan *v.* Olney, 6 Cal. 478.

[6] Ellis *v.* Lamme, 42 Mo. 153.

the mortgagee and his assignee upon the assignment of part of the notes,[1] reserving equal rights to the holders of the notes not assigned,[2] or otherwise establishing the equality or inequality of lien of the several notes.

1703. When the mortgage provides that upon any default the whole mortgage debt shall become due and payable, then there can be no preference given to the holder of the note on which default was made over the holder of the note not then due, because by such default the whole debt became due at the same time. A *pro rata* distribution should then be made between the holders of different parts of the debt.[3]

1704. If the mortgagor has a right of set-off against the mortgage notes, which are in the hands of various assignees, and the offset is made against one note, the proceeds of the sale should be so distributed as to make the final distribution conformable with their equitable rights under the law; as, for instance, under the rule adopted in Kentucky, to make all the assignees contribute ratably to the set-off.[4]

1705. When the mortgage secures debts due to different persons there may be either express or implied priorities between them. An agent, with the assent of his principal, having included in a mortgage to the latter a debt due from the mortgagor to himself, it was held, in the absence of any agreement as to preference, that the debt due the principal should first be paid out of the proceeds of a foreclosure sale.[5]

It is frequently the case that the instrument of assignment by its terms indicates or confers a preference upon the assignee as to the part of the claim assigned to him.

1706. Rights of sureties. — When the mortgage secures several debts, for some of which there are sureties who are not parties to the mortgage, the mortgagee becomes a trustee for the sureties to the amount of the funds thus provided for their indemnity; and he must see that the proceeds of a sale of the property are applied

[1] Grattan *v.* Wiggin, 23 Cal. 16.

[2] Howard *v.* Schmidt, 29 La. Ann. 129.

[3] See §§ 1179–1183; Bank of the U. S. *v.* Covert, 13 Ohio, 240; Bushfield *v.* Meyer, 10 Ohio St. 334.

In **Missouri**, however, it is held that without an express agreement to that effect the priority of right arising from the time of payment of the several notes secured is not impaired by such a provision in a mortgage or deed of trust. Hurck *v.* Erskine, 45 Mo. 484; Mitchell *v.* Ladew, 36 Mo. 526; Thompson *v.* Field, 38 Mo. 320.

[4] Campbell *v.* Johnston, 4 Dana (Ky.), 177.

[5] Philips *v.* Belden, 2 Edw. (N. Y.) 1.

in just proportions to the discharge of the debts on which the sureties are bound. Neither the mortgagor nor the mortgagee will be allowed to defeat the rights of the sureties, who have a right to be indemnified out of the property.

If in such case some of the debts include usurious interest, the mortgagor alone can avail himself of this defence. A surety on a debt paying legal interest cannot complain. He gets all the security that he bargained for when the mortgage was executed.[1]

1707. Sale for instalment. — As already noticed, when a sale is made of the entire premises, for the non-payment of an instalment of the mortgage, and there is a surplus after paying the amount due on the mortgage at the time, the court may retain this, and apply it to the subsequent instalments as they become due;[2] or, as some courts hold or statutes provide, may immediately apply the surplus to the payment of the notes not yet matured.

4. *Costs of Subsequent Mortgagees.*

1708. When proceeds of the sale under a decree in equity are insufficient to pay all the incumbrances in full, each mortgagee is entitled to be paid his costs as well as his debt, according to his priority, whether the bill be filed by the first or any subsequent mortgagee. The rule adopted in equity under a creditor's bill, when a fund is in court and is to be distributed among several claimants *pro rata*, or when the construction of a will is in doubt, and the rights of different claimants are to be determined, that the costs of all the parties shall in the first place be paid out of the fund, has no application in the case of the foreclosure of mortgages, for the parties have priority according to fixed rules of law. Of course it may happen that a subsequent mortgagee, after having incurred costs of suit and of sale, may lose these as well as his demand also; as where the proceeds of sale are only sufficient to pay the debt and costs due to the first mortgagee; but this was the risk assumed by taking the subsequent incumbrance. This rule seems best adapted to secure the rights of the parties, and is well established both in our own courts[3] and in those of England.[4]

[1] Fielder *v.* Varner, 45 Ala. 429.

[2] McDowell *v.* Lloyd, 22 Iowa, 448.

[3] Mayer *v.* Salisbury, 1 Barb. (N. Y.) Ch. 546; Smack *v.* Duncan, 4 Sandf. (N. Y.) 621; Farmers' Loan & Trust Co. *v.* Millard, 9 Paige (N. Y.), 620; Boyd *v.* Dodge, 10 Paige (N. Y.), 42; Lithauer *v.* Royle, 17 N. J. Eq. 40.

[4] Upperton *v.* Harrison, 7 Sim. 444, and cases there cited.

Where, however, a first mortgagee having a mortgage containing a power of sale lost his deed, and was obliged to resort to a suit in equity to obtain a sale, subsequent incumbrancers were allowed their costs, although the proceeds of sale were not sufficient to pay the plaintiff in full,[1] apparently because there should have been no occasion to come into equity. And where a mortgagee with a power of sale filed a bill, Baron Alderson said that the subsequent incumbrancers, being brought into court without necessity, were entitled to their costs, although the proceeds of sale were insufficient to pay the first mortgage.[2]

[1] Wontner *v.* Wright, 2 Sim. 543.

[2] Cooke *v.* Brown, 4 Y. & C. Exch. 227.

CHAPTER XXXVIII.

JUDGMENT IN AN EQUITABLE SUIT FOR A DEFICIENCY. 1709–1721.

1709. Generally. — By reference to the statutory provisions of the several states respecting foreclosure, it will be observed that in most of the states in which foreclosure is effected by an equitable action, authority is given to the court to adjudge the payment by the mortgagor, or any other person liable for the debt, of any deficiency there may be remaining unsatisfied after a sale of the mortgaged land. The codes of several states contain a provision, to which reference only is made in the statutes relating specifically to the subject of foreclosure, as follows: "In actions to foreclose mortgages, the court shall have power to adjudge and direct payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action; and the court may adjudge payment of the residue of such debt remaining unsatisfied, after a sale of the mortgaged premises, against such other person, and may enforce such judgment as in other cases." This provision exists in the same terms in the states of New York, Wisconsin, Nebraska, North Carolina, South Carolina, and Florida.[1]

Provisions differing somewhat from the foregoing are found in other states.

The Supreme Court of the United States, in 1864, in order to assimilate the practice in the circuit courts to the general practice in the state courts, adopted a rule that in all suits in equity

[1] **New York**: Code, § 167.
Wisconsin: C. 145, §§ 11 & 12.
Nebraska: Code, §§ 847, 849.
North Carolina: Code, § 126.
South Carolina: § 190.
Florida: Code (Bush's Dig. 1872), § 117.

for the foreclosure of mortgages in the circuit courts or in any of the courts of the territories, a decree may be rendered for any deficiency found due after applying the proceeds of the sale.[1] This rule applies to the courts of the District of Columbia.[2]

The judgment contemplated is one for the balance of the debt remaining after applying towards it the proceeds of the sale. The first step is to ascertain what the amount of this balance is. Therefore a judgment for a deficiency can be had only when the sale is completed; and it can only be known what the deficiency is upon the coming in of the report of sale, and the confirmation of this.[3] The usual practice is for the referee to state the amount of the deficiency in his report of the sale, and to determine who of the defendants are liable to pay the same to the plaintiff. This is provided for in the original judgment.[4] There can generally be no contingent judgment for such deficiency entered beforehand;[5] at any rate no execution can be issued beforehand.[6] When the person liable for deficiency does not appear in the cause, it is the practice, after calculation of the amount, to award execution for the deficiency without giving him notice of the motion.[7]

Persons who are only liable for the debt after the mortgaged property has been applied to its liquidation, as, for instance, mortgagors who have sold the land to others who have assumed the mortgage debt, have a right to require the sale of the whole equity of redemption for that purpose; and therefore they may require the joining of all persons who have any interest in the property, so that all equities in it may be extinguished. Although the ownership is in doubt or disputed, the court will order the person who appears to have an interest in the land to be brought in.[8]

A partner may properly insist that a mortgage of partnership

[1] 1 Wall. p. v.

[2] Freedman's Savings & Trust Co. *v.* Dodge, 7 Wash. L. R. 92.

[3] Bank of Rochester *v.* Emerson, 10 Paige (N. Y.), 359; Baird *v.* McConkey, 20 Wis. 297; Bache *v.* Doscher, 41 (N. Y.) Superior Ct. 150; Tormey *v.* Gerhart, 41 Wis. 54.

[4] McCarthy *v.* Graham, 8 Paige (N. Y.) 480.

[5] Cobb *v.* Thornton, 8 How. (N. Y.) Pr. 66; Bache *v.* Doscher, 41 (N. Y.) Superior Ct. 150; but see Moore *v.* Shaw, 15 Hun (N. Y.), 428.

[6] Howe *v.* Lemon, 37 Mich. 164.

[7] White *v.* Zust, 28 N. J. Eq. 107.

[8] Kortright *v.* Smith, 3 Edw. (N. Y.), 402.

property to secure a partnership debt shall be foreclosed before a personal judgment is rendered against him on the note.[1]

Upon the same principle it has been held that a defendant who is only secondarily liable may require the bringing in of the principal debtor, if within the jurisdiction of the court, for the purpose of obtaining against him a judgment for deficiency.[2]

When a judgment is rendered against several persons, some of whom are primarily liable and others only secondarily, the judgment for the deficiency should provide that it be enforced in the first place against the principal debtors, and then, so far as it remains unsatisfied only, against the sureties in the order of their liability, which should also be fixed.[3]

The liability of the payee of a note, who indorses it and gives a mortgage conditioned for its payment according to its tenor, is regarded as primary, and not merely that of an indorser.[4]

1710. Third persons liable for the mortgage debt may be joined as defendants. The codes of these and other states provide that the plaintiff may unite in the same complaint several causes of action belonging to one class of actions, as, for instance, such as arise out of the same transaction, or transactions connected with the same subject of action; but with the qualification that the causes of action so united must all affect all the parties to the action. In the states above named an exception is made in actions for the foreclosure of mortgages. It is generally considered that without this exception and a special provision for this case, the holder of a mortgage could not join a third party liable for the debt with the mortgagor in an action of foreclosure, for the purpose of obtaining a judgment for a deficiency against him. An action against the mortgagor alone in which a decree is sought for the sale of the property, and as well a judgment against him for a deficiency, would not embrace different causes of action, but different remedies for the same cause; but when a third person is joined for the purpose of obtaining a judgment against him for a deficiency, it is considered, in the absence of such express provision, that there is a misjoinder of causes of ac-

[1] Warren *v.* Hayzlett, 45 Iowa, 234.

[2] Bigelow *v.* Bush, 6 Paige (N. Y.), 343.

[3] Luce *v.* Hinds, Clarke (N. Y.), 453; Leonard *v.* Morris, 9 Paige (N. Y.), 90; and see Jones *v.* Steinbergh, 1 Barb. (N. Y.) Ch. 250; Farnham *v.* Mallory, 5 Abb. N. S. (N. Y.) Pr. 380.

[4] Robertson *v.* Cauble, 57 Ind. 420; Zekind *v.* Newkirk, 12 Ind. 544.

tion. This seems to be the distinction established by the authorities. When, therefore, the code of a state does not contain such express provision, a judgment for a deficiency cannot be obtained against any persons liable for the debt other than the mortgagor himself.[1] The only remedy against a third person liable for the mortgage debt is by a separate action after the deficiency has been ascertained. Objection to a complaint which improperly joins these different causes of action must be taken by answer or demurrer, or it will be deemed to be waived;[2] and if there be no such objection, a judgment for the deficiency may be entered, though not expressly authorized by any statute.[3]

Mere delay on the part of the mortgagee to foreclose, when he had not been requested to do so, and the interest has been paid, does not render him liable for a loss occasioned by a fall in the market value of the property.[4]

A personal judgment for a deficiency in a foreclosure suit may be had against one who in assigning a mortgage has made a guaranty of it.[5]

1711. A court of equity cannot, independent of any provision of statute giving the authority, decree the payment of the balance that may remain of the mortgage debt after applying the proceeds of the property mortgaged, unless the debt, without the mortgage, was such that a court of chancery would have jurisdiction of it and could enforce it.[6] A foreclosure in equity, though not a proceeding *in rem*, is in the nature of such a proceeding, and is not intended ordinarily to act *in personam*. Without the aid of statute or of circumstances giving equitable jurisdiction over the demand, the only proper remedy for the deficiency is by action at law upon the bond or note.[7] If, however, no note, or

[1] Pomeroy's Remedies, § 459; Doan *v.* Holly, 26 Mo. 186; 25 Mo. 357; Faesi *v.* Goetz, 15 Wis. 231; Cary *v.* Wheeler, 14 Wis. 281; Jesup *v.* City Bank, 14 Wis. 331; Stilwell *v.* Kellogg, 14 Wis. 461; Borden *v.* Gilbert, 13 Wis. 670. See McCarthy *v.* Garraghty, 10 Ohio St. 438.

[2] Baird *v.* McConkey, 20 Wis. 297.

[3] Cary *v.* Wheeler, 14 Wis. 281.

[4] Merchants' Ins. Co. *v.* Hinman, 34 Barb. (N. Y.) 410.

[5] § 1432; Ofpeer *v.* Burchell (N. Y. Superior Ct., Jan. 1879), 19 Alb. L. J. 57.

[6] Fleming *v.* Sitton, 1 Dev. & Bat. Eq. (N. C.) 621; Morgan *v.* Wilkins, 6 J. J. Marsh. (Ky.) 28; McGee *v.* Davie, 4 Ib. 70; Dunkley *v.* Van Buren, 3 Johns. (N. Y.) Ch. 331; Hunt *v.* Lewin, 4 Stew. & Port. (Ala.) 138; Downing *v.* Palmateer, 1 T. B. Mon. (Ky.) 64; Stark *v.* Mercer, 4 Miss. (3 How.) 377; Orchard *v.* Hughes, 1 Wall. 73.

[7] In **South Carolina** a practice grew up in the equity courts of rendering a decree for the deficiency, though this was "confessedly a departure from the proced-

bond, or other legal obligation was given, or if this has been lost, the court may enforce the demand as an equitable one against the mortgagor by a personal decree for the balance remaining unsatisfied.[1] When the mortgaged premises have been sold to one subject to the mortgage, which he agrees to pay, his obligation enures in equity to the benefit of the holder of the mortgage, who is entitled upon foreclosure to a decree against such purchaser for any deficiency there may be after applying to the debt the proceeds of the sale. The right to such a decree is upon the ground that the claim is purely an equitable one.[2]

Generally as already stated there are statutes giving authority to render judgments for the deficiency not only against the mortgagor, but also against any other person who has assumed the payment of the debt, or who has become a guarantor or surety of it,[3] or has made any collateral undertaking for the payment of it.[4]

Any defence which prevails against a general decree of foreclosure will generally be equally good against a personal decree for the debt; and there may be defences to the latter which are not good against the former.[5]

1712. One who has bought subject to the debt merely is not liable for it. A decree for the deficiency cannot be rendered against a subsequent purchaser or mortgagee unless he has assumed the payment of the mortgage debt.[6] Whether a personal responsibility is assumed is in all cases a question of intention, and unless the parties have declared this intention by words appropriate and sufficient to express it, there can be no such liability. If the deed simply says the land is subject to a certain mortgage, then the cases all agree that the purchaser is not personally bound to pay it.[7] The addition of the further words, "which has been estimated as a part of the consideration money of this conveyance,

ure of the English Chancery." Wightman *v.* Gray, 10 Rich. Eq. (S. C.) 518.

[1] Crutchfield *v.* Coke, 6 J. J. Marsh. (Ky.) 89; Waddell *v.* Hewitt, 2 Ired. Eq. (N. C.) 252.

[2] Halsey *v.* Reed, 9 Paige (N. Y.), 446; Klapworth *v.* Dressler, 13 N. J. Eq. 62; Hoy *v.* Bramhall, 19 N. J. Eq. 563. By a subsequent statute (Nix. Dig. p. 119) of 1866, the power of the court in such cases is recognized and extended. See, also, Stiger *v.* Mahone, 24 N. J. Eq. 426.

[3] Jarman *v.* Wiswall, 24 N. J. Eq. 267; Bristol *v.* Morgan, 3 Edw. (N. Y.) Ch. 142; Jones *v.* Stienbergh, 1 Barb. Ch. 250; Sauer *v.* Steinbauer, 14 Wis. 70.

[4] Curtis *v.* Tyler, 9 Paige (N. Y.), 432.

[5] As where the mortgage is void for usury. Mann *v.* Cooper, 1 Barb. (N. Y.) Ch. 185.

[6] §§ 735–738; Mount *v.* Potts, 23 N. J. Eq. 188.

[7] Hull *v.* Alexander, 26 Iowa, 569.

and has been deducted therefrom," does not impart anything more.[1]

A decree which finds the sum due on the mortgage, and requires a subsequent purchaser to pay the same by a day named, and if he does not, that the mortgaged premises be sold, is not a personal decree against the purchaser, but an alternative one, giving him the option to pay the money or suffer the property to be sold.[2]

1713. If there are words in the deed importing that the grantee is to pay the mortgage to which the land is subject, he is deemed to have entered into an express undertaking to do so by the mere acceptance of the deed without having signed it. No precise or formal words are necessary. If they show an intention that the grantee shall pay the debt, he thereby becomes personally liable for it.[3] If the agreement to pay the debt is not contained in the deed to the purchaser, it must be evidenced by some writing and supported by a good consideration.

When such grantee is not made a party to the foreclosure suit, and a judgment for a deficiency is recovered against the grantor, he is entitled to recover the same, with costs of foreclosure of the grantee, in a suit at law. A statute such as exists in New York,[4] prohibiting proceedings at law without leave of court for the recovery of the debt after a decree has been entered in a suit to foreclose the mortgage, has no application to such a suit by the grantor. It applies only to a suit by the holder of the mortgage.[5]

If a mortgagee, upon assigning the mortgage, has guaranteed the payment of it, the amount of his liability, in case he has received less than the face of the mortgage, may be limited to the amount he received, with interest.[6]

1714. Though the conveyance was merely for security. — It does not matter, as regards the personal liability of one who has assumed to pay the mortgage, that he took the deed of the equity of redemption merely as security for an indebtedness ow-

[1] Belmont *v.* Coman, 22 N. Y. 438.

[2] Gochenour *v.* Mowry, 33 Ill. 331; Glover *v.* Benjamin, 73 Ill. 42.

[3] §§ 741, 748 *et seq.*; Ricard *v.* Sanderson, 41 N. Y. 179; Belmont *v.* Coman, 22 N. Y. 438; Trotter *v.* Hughes, 12 N. Y. 74; Vail *v.* Foster, 4 N. Y. 312; Curtis *v.* Tyler, 9 Paige (N. Y.), 432; Halsey *v.* Reed, Ib. 446; Marsh *v.* Pike, 10 Ib. 595; Blyer *v.* Monholland, 2 Sandf. (N. Y.) Ch. 478; Lawrence *v.* Fox, 20 N. Y. 268; Miller *v.* Thompson, 34 Mich. 10.

[4] 2 R. S. 191, § 155.

[5] Campbell *v.* Smith, 71 N. Y. 26; Comstock *v.* Drohan, 71 N. Y. 9; S. C. 8 Hun (N. Y.), 373.

[6] Goldsmith *v.* Brown, 35 Barb. (N. Y.) 484; Rapelye *v.* Anderson, 4 Hill (N. Y.), 472.

ing to him by the firm of which the mortgagor was a member;[1] though under other circumstances, when the conveyance was intended to operate merely as a mortgage, the reservation by the grantor of the right to pay the debt, and thereby discharge the obligation to pay the prior mortgage, has been held to be inconsistent with the idea that the assumption was for the benefit of the prior mortgagee.[2]

1715. If there be no bond, note, or other separate agreement in writing or covenant in the mortgage for the payment of the mortgage debt,[3] or the mortgage secures the notes of third persons,[4] there can ordinarily be no personal judgment for any deficiency. But if the defendant appears to the action and consents to such a judgment, it is valid.[5] There can be no personal judgment in case the mortgagee has agreed with the mortgagor to give up the notes, and to look to the property only;[6] or has released the mortgagor from all personal liability;[7] or in case the debt is barred by the statute of limitations.[8]

When, however, the debt exists independently of the mortgage, though not evidenced by any writing, the deficiency not satisfied by a sale of the land may be recovered by action.[9]

But where there was an oral agreement between three persons to purchase certain real estate on joint account as a speculation, and to divide the profits in proportion to the amounts contributed, and the title was taken in the name of one of the partners who personally gave his bond and mortgage to secure a portion of the purchase money, the holder of the mortgage was not allowed to recover judgment for a deficiency arising from a foreclosure sale against the other partners whose names did not appear upon the papers.[10]

In several states it is provided by statute that no mortgage shall be construed as implying a covenant for the payment of the sum intended to be secured; and when there is no express covenant for such payment contained in the mortgage, and no bond or

[1] Ricard *v.* Sanderson, 41 N. Y. 179; and see Campbell *v.* Smith, 8 Hun (N. Y.), 6; 71 N. Y. 26.

[2] § 757.

[3] §§ 72, 678, 750; Hunt *v.* Lewin, 4 Stew. & P. (Ala.) 138.

[4] Metz *v.* Todd, 36 Mich. 473.

[5] Fletcher *v.* Holmes, 25 Ind. 458.

[6] Moore *v.* Reynolds, 1 Cal. 351.

[7] Brown *v.* Winter, 14 Cal. 31.

[8] Wiswell *v.* Baxter, 20 Wis. 680; Mich. Ins. Co. *v.* Brown, 11 Mich. 265.

[9] Savage *v.* Stone, 1 Utah T. 35.

[10] Williams *v.* Gillies, (N. Y. Ct. Appeals, Nov. 1878), 8 N. Y. Weekly Dig. 12.

other separate instrument to secure the payment has been given, the remedies of the mortgagee are confined to the lands mentioned in the mortgage.[1]

1716. A judgment for a deficiency cannot be rendered against a non-resident who has not appeared nor been served with process within the state. The court in such case has no jurisdiction of the person, and the remedy is confined to a foreclosure and sale of the land.[2] When so provided by statute, a judgment obtained against a non-resident upon service by publication might be enforced against his property in the state. Such a judgment would generally impose upon him no personal liability.

1717. Upon the decease of the mortgagor, if the administrator or executor be a party to the bill, then no judgment can be entered against him for any deficiency remaining after application of the proceeds of sale. A claim for the deficiency must be presented under the proceedings for the administration of the estate.[3] The suit can be prosecuted against the executor or administrator only for the purpose of reaching the property and subjecting it to sale. "If the court could render a judgment against the property of the deceased in the hands of the administrator, the mortgagee first foreclosing would in effect get priority of payment out of the estate, not only as against general creditors, but as against all mortgagees later in foreclosing, though in the same class of creditors."[4]

No judgment can be had against a purchaser from the mortgagor unless he has assumed the payment of the debt.[5] Nor can such judgment be had against the heir or devisee of a deceased mortgagor.[6]

[1] **California**: Code, 1872, § 2928.
Indiana: Revision, 1876, vol. 2, p. 261.
Michigan: 2 Compiled Laws of 1871, p. 1342.
Oregon: Gen. Laws, p. 516.
Wisconsin: Rev. Stat. 1871, p. 1143.
Wyoming Territory: Compiled Laws, 1876, c. 3, § 6.
Dakota Territory: Civil Code, 1871, § 1624.

[2] Schwinger *v.* Hickok, 53 N. Y. 280; Lawrence *v.* Fellows, Walk. (Mich.) 468.

[3] Pechaud *v.* Rinquet, 21 Cal. 76; Cowell *v.* Buckelew, 14 Cal. 640; Fallon *v.* Butler, 21 Cal. 24; Leonard *v.* Morris, 9 Paige (N. Y.), 90; Null *v.* Jones, 5 Neb. 500.

[4] Per Mr. Justice Perkins, in Newkirk *v.* Burson, 21 Ind. 129; and see Rhodes *v.* Evans, 1 Clarke (N. Y.), 168. This is at any rate the rule before the expiration of the period limited for the settlement of the estates of deceased persons. Hathaway *v.* Lewis, 2 Disney (Ohio), 260.

[5] Burkham *v.* Beaver, 17 Ind. 367; Carleton *v.* Byington, 24 Iowa, 172.

[6] Leonard *v.* Morris, 9 Paige (N. Y.), 90.

1718. A personal judgment against the wife is erroneous when the mortgage was executed by her with the husband upon his own land to secure his own debt. She is properly made a party to the suit for the purpose of concluding her rights of dower, but is not a party in any other sense.[1] Before a judgment can be rendered against her on her bond made jointly with her husband, it must appear affirmatively from the allegations and evidence that the debt was her own proper debt or related to her separate estate.[2] Neither can such a judgment be entered against a widow of the mortgagor, who with his heirs is made a party to the suit after his death ;[3] nor against the heirs.[4] But if a married woman is herself one of the mortgage debtors, and is possessed of separate property other than that mortgaged, a personal judgment may properly be rendered against her for the deficiency.[5] But no obligation on her part can be implied from an agreement that certain lands conveyed by her husband and herself as security for his debt shall be reconveyed to her alone on repayment of the debt, although the agreement purports to make her liable for the advances ; especially where by statute no covenant for the payment of the debt secured can be implied in a mortgage.[6]

1719. No judgment can be rendered for such parts of the debt as are not due. The court can only direct at what time and upon what default any subsequent judgment and execution may issue.[7] But if the mortgage provides that upon default in payment of any instalment of the mortgage debt, or of interest, the whole debt shall immediately become due and payable, a personal judgment may be entered for the whole debt upon a default in payment of the first instalment of principal or interest.[8]

[1] O'Brian *v.* Fry, 82 Ill. 274; Wright *v.* Langley, 36 Ill. 381 ; Key *v.* Addicks, 8 Ind. 521 ; Kirke *v.* Fort Wayne Gas Light Co. 13 Ind. 26 ; Patton *v.* Stewart, 19 Ind. 233 ; Emmett *v.* Yandes, 60 Ind. 548 ; Neitzel *v.* Hunter, 19 Kans. 221.

[2] § 111 ; Manhattan Life Ins. Co. *v.* Glover, 14 Hun (N. Y.), 153.

[3] Brown *v.* Orr, 29 Cal. 120.

[4] Alexander *v.* Frary, 9 Ind. 481.

[5] Merchants' Nat. Bk. *v.* Raymond, 27 Wis. 567.

[6] Howe *v.* Lemon, 37 Mich. 164.

[7] Danforth *v.* Coleman, 23 Wis. 528 ; Skelton *v.* Ward, 51 Ind. 46. The case of Allen *v.* Parker, 11 Ind. 504, in which it was said that judgment might be rendered for the amount due, and to become due, is questioned in Thompson *v.* Davis, 29 Ind. 264 ; and the judgment spoken of was not a personal judgment, but one authorizing a sale. "It is only so far as the sale of the mortgaged premises is concerned, when the premises are indivisible, that the debt can be collected before it becomes due." Skelton *v.* Ward, *supra.*

[8] Darrow *v.* Scullin, 19 Kans. 57. But it is not an error of which the mortgagor can complain that judgment is rendered only upon the first instalment.

1720. When it becomes a lien. — The decree for a deficiency of proceeds does not have the force and effect of a judgment at law so as to become a lien until the deficiency is ascertained.[1] This deficiency can only be ascertained from the sale, and the judgment becomes a lien upon the other property of the debtor only from the time it is docketed.[2]

By the practice generally adopted no further action by the court is necessary after the amount of the deficiency is reported, but the clerk may issue an execution for it without further order.[3] In some states the mortgagee may take a decree fixing the amount due and directing a sale, and then, after the sale, apply for a further decree fixing the deficiency and granting an execution for this; or he may take a judgment at once for the whole amount due from which the officer making the sale deducts the proceeds of it, and in that way ascertains the deficiency;[4] and no further proceedings are necessary on the part of the court to ascertain the deficiency.

Inasmuch as the personal decree and execution cannot precede a sale of the premises, where equity required that the remedy against the mortgagor upon his bond should be first exhausted, proceedings in the foreclosure suit were suspended, to give time for the plaintiff's bringing a suit at law upon the bond.[5]

1721. The personal remedy may be enforced without foreclosure against one who has made himself personally liable for the payment of a mortgage debt, and even without joining the mortgagor as defendant.[6] A judgment rendered in a foreclosure suit against the mortgagor is competent evidence of the amount of the mortgage debt, and of the amount of the deficiency remaining after a sale of the property in a separate suit by the mortgagor against one who assumed the debt and was not a party to the foreclosure suit.[7] But under the codes of some states, as, for instance, those of New York and Michigan, when the mort-

[1] Mutual Life Ins. Co. *v.* Southard, 25 N. J. Eq. 337. See Fletcher *v.* Holmes, 25 Ind. 458.

[2] Cormerais *v.* Genella, 22 Cal. 116; Rollins *v.* Forbes, 10 Cal. 299; Rowe *v.* Table, &c. Co. Ib. 441.

[3] Baird *v.* McConkey, 20 Wis. 297. See Burdick *v.* Burdick, 20 Wis. 348.

[4] Rowland *v.* Leiby, 14 Cal. 156; and see Creighton *v.* Hershfield, 2 Mon. T. 386.

[5] Vanderkemp *v.* Shelton, 1 Clarke (N. Y.), 321.

[6] Burr *v.* Beers, 24 N. Y. 178; Lawrence *v.* Fox, 20 N. Y. 268.

[7] Comstock *v.* Drohan, 8 Hun (N. Y.), 373; 71 N. Y. 9.

gagee has voluntarily refrained from asking in his foreclosure suit for a decree for any deficiency, or has voluntarily omitted to join one who had become liable for the debt, some satisfactory reason should be given for permitting him to institute a separate action at law for its recovery.[1] Such leave will not be granted when it appears that the deficiency has been created in part or wholly by interference of the holder of the mortgage to prevent others from bidding at the foreclosure sale.[2]

[1] In **New York**: 2 R. S. 191, § 155; Comstock *v.* Drohan, 71 N. Y. 9; Equitable Life Ins. Soc. *v.* Stevens, 63 N. Y. 341. **Michigan**: C. L. § 5149; Innes *v.* Stewart, 36 Mich. 285.

[2] Innes *v* Stewart, *supra.*

CHAPTER XXXIX.

STATUTORY PROVISIONS RELATING TO POWER OF SALE MORTGAGES AND TRUST DEEDS.

I. Introductory, 1722.

II. Statutory provisions in the several states, 1723–1763.

1. *Introductory.*

1722. In England a mortgage is now considered incomplete without a power of sale; and in fact since Lord Cranworth's Act[1] in 1860, all mortgages are in effect made power of sale mortgages; for this act provides that where money is secured by a deed of land or of any interest in it, the person to whom the money for the time being is payable shall, at any time after the expiration of one year from the time when the principal shall have become payable, or after any interest shall have been in arrear for six months, or after any omission to pay any premium on any insurance which ought to be paid by the person entitled to the property, shall have to the same extent as if conferred by the mortgagor: 1st. A power to sell the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make. 2d. A power to insure from loss by fire, and to add the premiums to the debt secured at the

[1] 23 & 24 Vict. c. 145. This act it is said, has been of practical use only in some few cases, where the mortgage deed contained no power of sale; for a special power of sale is almost universally given by the deed, even since this act, for a more expeditious mode of obtaining the money is demanded. So far as the act was intended to shorten the mortgage deed, it has wholly failed. Greenwad's Prac. of Conveyancing, 55. It has been suggested that this failure of the statute is due in part to the intense caution and deep-rooted conservatism which is always found among conveyancers; although the fact, that deeds are charged for according to their length, is supposed by an English writer to have had something to do with the failure, not only of this provision, but of others made with the like intent to shorten papers used in conveyancing.

In a subsequent statute, 25 & 26 Vict. c. 53, a power of sale intended to operate under the foregoing statute is given in a form of mortgage annexed to the act as follows: "C. D. shall have power to sell on default of payment of the principal or interest, or any part thereof respectively."

same rate of interest. 3d. A power to appoint or obtain the appointment of a receiver of the rents and profits.[1] No such sale can be made until after six months' notice in writing given to the person or one of the persons entitled to the property, or affixed on some conspicuous part of the property. The purchaser's title is not liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no notice had been given; but any person damnified by an unauthorized sale has his remedy in damages against the person selling. The person selling makes a deed to the purchaser and gives a receipt for the money, which fully discharges him. The purchase money is applied to the payment of the expenses of sale, the interest and principal of the debt, and the surplus to the person entitled to the property sold.[2] The act also contains provisions for the appointment when necessary of a receiver, whose duties it declares. It makes every mortgage executed after the passing of the act a power of sale mortgage, unless the application of the act is expressly negatived by the deed itself.

The primary object of this statute was to provide a power of sale for all mortgages. A secondary object was to shorten the mortgage deed used in that country, but in this respect the statute has wholly failed. It has been of use in affording a power of sale in some few cases in which the mortgage deed contained no power of sale. The chief cause of the failure of the statute has been that it was not liberal enough in its provisions. A more expeditious mode of obtaining the money out of the mortgaged property is almost universally demanded, so that a special power of sale is almost always inserted in the deed. The general object of this statute cannot be too highly commended; and it is to be hoped that statutes in similar form, but more liberally framed, may be enacted in this country. A power provided by statute, while it would prevent the cumbering of the records with the elaborate provisions in common use for enforcing the security, would make securities more certain, and therefore more valuable to both par-

[1] Where it is desired that the mortgagee shall not have all or any of the powers conferred by the act, it may be prevented by express declaration. Ib. § 32.

[2] It is to be observed that this statutory power does not protect the purchaser's title except in these two instances. The express powers usually inserted in mortgages are intended to protect the purchaser in all cases of unauthorized and irregular sales, if he buys in good faith and without knowledge of the improper or irregular exercise of the power. Fisher on Mort. p. 511.

ties; for the construction of such a power would soon be settled, and settled for the whole community. Some protection might be afforded the mortgagor at the same time; but too much legislation in this respect would be much worse than none at all, for the efficacy and simplicity of this remedy might be easily destroyed. Even now in a few states the exercise of the power is so restricted and hedged about with provisions in regard to notice, the conduct of the sale, and redemption afterwards, that this remedy is only a little better, perhaps, than the cumbersome and expensive process by equitable suit.

The only states in which a statutory power of sale has been provided are Virginia and West Virginia. The statute is the same in both states, the latter state having adopted the statute of the former. This statute applies to trust deeds only, as this form of security has in those states wholly superseded the use of mortgages. It provides in a few simple terms for the sale of the property by the trustee, whenever, after default, the creditor may require it; and for the application of the proceeds to the payment of the debt, the compensation of the trustee, and the rendering of the surplus to the debtor. In its brevity and simplicity this statute is to be commended.

2. *Statutory Provisions in the several States.*

1723. Alabama. — The usual form of mortgage now used in Alabama contains a power of sale authorizing foreclosure without the intervention of a court, by publication of a notice. Deeds of trust are also in use. The power to sell is part of the security, and may be executed by any person who, by assignment or otherwise, becomes entitled to the money secured.[1] Property sold under a power is subject to redemption for two years, in the same way as when sold under decree of foreclosure in chancery.[2]

1724. Arkansas. — Trust deeds are in use, and must be acknowledged and recorded the same as mortgages.

1725. California. — Neither power of sale mortgages nor trust deeds are in very general use in this state, although it is provided by statute that a power of sale may be conferred upon a mort-

[1] Code, 1876, § 2198.

An administrator may sell under the power, though by its terms it runs only to the mortgagee, "his heirs and assigns." Lewis *v.* Wells, 50 Ala. 198.

[2] Code, *supra*, §§ 2877–2889.

gagee or other person.[1] A power of sale contained in the mortgage is merely a cumulative remedy, and does not in any way affect the right to foreclose in chancery.[2] The mortgagee has his election to foreclose in that way, or under the power of sale vested in him by the mortgage. The right to sell rests upon the contract of the mortgagor, and a sale fairly made passes a good title to the purchaser. It is provided that the power to sell is to be deemed a part of the security, and that it shall vest in and may be executed by any person who, by assignment or otherwise, becomes entitled to the money so secured to be paid whenever the assignment is duly acknowledged and recorded.[3]

1726. Colorado. — Power of sale mortgages and trust deeds are both in use.

1727. Connecticut. — Power of sale mortgages and trust deeds are not in general use.

1728. Dakota Territory.[4] — A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security. The power is a part of the security, and passes by an assignment.[5] Such power of sale is a trust and can be executed only in the manner prescribed.[6] Before a foreclosure can be made by advertisement, a default must have occurred, and it is further requisite that there be no suit pending for the recovery of the debt; that any execution that may have been rendered shall have been returned unsatisfied; and that the mortgage and any assignment of it shall have been recorded. Each instalment of the mortgage is deemed to be a separate mortgage so far as to entitle the holder of it to a foreclosure.

Notice of the foreclosure sale must be given by publishing the same for six successive weeks, at least once in each week, in a newspaper of the county where the premises or some part of them are situated, if there be one; if not, then in the nearest paper published in the territory. The notice must specify the names of the mortgagor and mortgagee, and the assignee, if any; the date of the mortgage, and where recorded; the amount

[1] Civil Code, § 2932.

[2] Fogarty *v.* Sawyer, 17 Cal. 589; Cormerais *v.* Genella, 22 Cal. 116. Whether a right of redemption exists after such sale was a question raised but not decided in the case of Cormerais *v.* Genella, *supra*.

[3] Civil Code, § 858; 1 Codes & Stats. 1876, §§ 5858, 5859.

[4] Rev. Codes, 1877, pp. 613–616.

[5] Civil Code, *supra*, § 313.

[6] Civil Code, § 1730.

claimed to be due at the date of the notice; a description of the premises substantially as in the mortgage; and the time and place of sale.

The sale must be at public vendue, between the hour of nine o'clock in the forenoon and the setting of the sun on that day, in the county in which the premises to be sold or some part of them are situated, and must be made by the person appointed for that purpose in the mortgage, or by the sheriff or deputy sheriff of the county, to the highest bidder.

The sale may be postponed by inserting a notice of the postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing this until the time of the postponed sale, at the expense of the party requesting the postponement. If the premises consist of distinct farms or lots, they must be sold separately, and no more can be sold than is sufficient to satisfy the amount due at the date of the notice of sale, with interest and costs. The mortgagee may fairly and in good faith purchase at the sale. The officer making the sale gives to the purchaser a certificate stating when he will be entitled to a deed if the premises are not redeemed. Redemption may be made within one year after the sale by payment to the purchaser, if within the county, or otherwise to the officer who made the sale, of the amount for which the premises sold, together with interest at the rate of ten per cent. per annum from the time of sale. But the mortgagor is not entitled to retain possession of the premises after the sale. If not redeemed, the officer executes a deed of the premises to the purchaser. Any surplus there may be must be paid over by the officer to the mortgagor, his representatives or assigns.

The evidence of the sale may be perpetuated by an affidavit of the publication of the notice made by the printer; an affidavit of the fact of sale, of the time and place of the sale, of the sum bid, and the name of the purchaser, made by the person who acted as auctioneer. Such affidavits are recorded in the registry of deeds for the county, and are presumptive evidence of the facts set forth.

The party foreclosing a mortgage by advertisement is entitled to his costs and disbursements out of the proceeds of sale, in addition to any attorney's fee agreed upon in the mortgage.

1729. **Delaware.** — Power of sale mortgages and trust deeds are not in general use.

1730. **District of Columbia.** — Deeds of trust with power of sale are in use to the exclusion, almost, of mortgages.

1731. **Florida.** — Neither of these instruments seem to be in general use.

1732. **Georgia.** — Mortgages with powers of sale are valid.[1]

1733. **Illinois.**[2] — It is usual for mortgages to contain a power of sale; and trust deeds are generally preferred to mortgages. No sale can be made by virtue of a power in a mortgage or trust deed after the death of the owner of the equity of redemption; but foreclosure may be made in the same manner as of mortgages not containing a power of sale.

In all sales in pursuance of a power, at least thirty days' previous notice of such intended sale shall be given. It is sufficient to insert in such notice the date of the instrument, the names of the grantor and grantee, and of the assigns, if any; the amount of indebtedness the instrument was given to secure, the amount claimed to be due, a description of the premises to be sold, and the time, place, and terms of the sale; and no sale shall be made except in the county in which the premises are situated. The notice shall be given by publication once in each week, for four successive weeks, in some newspaper or other paper authorized by law to publish legal notices, published in the county or counties where the premises are situated, or if no paper is published in the county or counties where the premises are situated, the nearest newspaper published in this state; but in no case shall a notice be given for a shorter time than is required by the mortgage or deed of trust. A recital in a deed made in pursuance of a power, that due notice was given, is *primâ facie* evidence of the giving of such notice.

The mortgagor may authorize the sheriff of the county in which the land or some part thereof is situated to execute the power of sale granted to the mortgagee; in which case the sheriff may advertise and sell pursuant to the power, and may execute conveyances in the name, and as the attorney in fact, of the mortgagor; and the mortgagee may purchase at the sale.[3]

[1] Calloway *v.* People's Bank of Bellefontaine, 54 Ga. 441; Robenson *v.* Vason, 37 Ga. 66.

[2] R. S. 1877, p. 676.

[3] The purchaser after demand in writing upon the party in possession may ob-

The statutes allowing redemption upon sale of mortgaged premises have no application to a sale under a trust deed or power in a mortgage.[1]

1734. Indiana. — Power of sale mortgages are not in use. They are not invalid by reason of the power, though they must be foreclosed in equity.[2] By authority given the mortgagee independent of the mortgage, he may act as the agent of the mortgagor in the sale of the premises.[3] Trust deeds are sometimes used, and sales by trustees under powers in such deeds are authorized by statute.[4]

1735. Iowa. — Deeds of trust and mortgages with powers of sale made since April 1, 1861, can be foreclosed only by action in court by equitable proceedings. Deeds of trust may be executed as securities, but are considered as, and foreclosed like, mortgages.[5]

1736. Kansas. — As mortgages can be foreclosed by suit only, powers of sale are of no practical advantage.[6] It is provided, however, that where a power to sell lands or other property shall be given to the grantee, in any mortgage or other conveyance intended to secure the payment of money, the power shall be deemed a part of the security, and shall vest in any person who shall become entitled to the money so secured to be paid.[7]

1737. Kentucky. — Power of sale mortgages and trust deeds must be enforced by a court of equity; but in making sale the court will follow the terms of the power.[8]

Sales made under trust deeds to secure debts are invalid, unless the maker of the deed join in it, or it is made in pursuance of a decree or order of court.[9] A statute passed in 1873, limited in

tain possession by summary process under the forcible entry and detainer act. Rev. Stat. 1874, p. 535; Rice *v.* Brown, 77 Ill. 549.

[1] Bloom *v.* Van Rensselaer, 15 Ill. 503.

[2] Revision, 1876, vol. 2, pp. 261, 334; Rowe *v.* Beckett, 30 Ind. 154; Martin *v.* Reed, 30 Ind. 218.

[3] Farley *v.* Eller, 29 Ind. 322.

[4] 1 Rev. 1876, p. 915; Act of June 17, 1852.

[5] Code, 1873, § 3319. They were in use before that date. Pope *v.* Durant, 26 Iowa, 233; Crocker *v.* Robertson, 8 Iowa, 404; Fanning *v.* Kerr, 7 Iowa, 450.

[6] Samuel *v.* Holliday, 1 Woolw. 400.

[7] Gen. Statutes, Kans. 1868, c. 114, § 18; 2 Dassler's Stat. 1876, § 5631.

[8] Campbell *v.* Johnson, 4 Dana, 178.

[9] Rev. Stat. 1873, p. 588. See, also, Lyons *v.* Field, 17 B. Mon. 549; Smith *v.* Vertrees, 2 Bush, 63. But this statute does not apply to a sale made under a power of attorney, and a trust to apply the proceeds to the payment of the debts of the principal. As no title passed to the trustee, such as would enable him to convey the land in his own name, it was not a trust deed within the meaning of the statute. Reed *v.* Welsh, 11 Bush, 450.

its operation to cities having not less than 75,000 inhabitants, provides that the trustee may sell the property conveyed at public auction, in such parcels and upon such terms, as may be directed in the deed, the trustee first giving such notice of the time, place, and terms of sale as may be specified by the deed; and the trustee's deed vests in the purchaser all the right, title, and interest of the grantor, as fully as if he himself executed it.[1]

1738. Louisiana. — Mortgages and deeds of trust, with powers, are not in use.

1739. Maine. — Power of sale mortgages are sometimes used, though trust deeds are not.

1740. Maryland. — Power may be given to the mortgagee, or any other person named in the deed, to sell the mortgaged premises, upon the terms and contingencies expressed in the mortgage, under direction of the court,[2] and when the interests in any mortgage are held under one or more assignments, or otherwise, the power of sale therein contained shall be held divisible, and he or they holding any such interest who shall first institute proceedings to execute such power shall thereby acquire the exclusive right to sell the mortgaged premises.[3] Before making sale, however, the person authorized to sell must give bond to the state in such penalty and security as shall be approved by the judge or clerk of a court of equity of the city or county in which the premises lie, to abide by and fulfil any order or decree which shall be made in relation to the sale, or the proceeds of it; which bond is for the security of all persons interested in the property or the

[1] Rev. Stat. 1873, p. 844.

[2] Code, 1860, p. 445.

These proceedings are under the general common law and chancery powers of the court, and are simply a summary mode of exercising an ordinary jurisdiction. Instead of a bill in equity for foreclosure, the agreement of the parties, as expressed in the power contained in the mortgage, is substituted for a decree of sale; and upon final ratification by the court of the report, the sale has all the judicial sanction that it could have on formal proceedings in equity. Having jurisdiction independent of the statute, the court may decide upon every question which occurs in the cause, and its judgment is binding until reversed. A sale ratified by the court cannot be called in question in a collateral proceeding. Cockey *v.* Cole, 28 Md. 285. In the city of Baltimore, under a public local law, a decree for sale may be in the first place obtained from the court of equity; and the sale is made by a trustee appointed by the court, after giving bond and advertising. He reports the sale to the court, and if everything is properly done an order is passed ratifying and confirming the sale. Code, vol. 2, p. 307. The validity of such sale may be inquired into at any time before the final order of confirmation is passed. Black *v.* Carroll, 24 Md. 251.

[3] Laws, 1878, c. 483.

proceeds of it.[1] Such notice of the sale shall be given as is provided for in the mortgage; or if there be no agreement as to notice, then the party offering the property for sale shall give twenty days' notice of the time, place, and terms, by advertisement in some newspaper printed in the county where the premises lie; or if there be no such newspaper, then in a newspaper having a large circulation in the county, and also by advertisement put up at the court-house door of said county.

All such sales must be reported under oath to the court, and there must be the same proceedings on such report as if the same were made by a trustee under a decree of court, and the sale may be confirmed or set aside.[2] If set aside a resale may be ordered, and if justice requires it the court may appoint a trustee to sell the same. The sale, when confirmed by the court and the purchase money is paid, passes all the title which the mortgagor had at the time of the recording of the mortgage. Any person having an interest in the equity of redemption may apply to the court confirming the sale to have the surplus of the proceeds of sale, after payment of the mortgage debt and expenses, paid over to such person, or so much as will satisfy his claim, and the court distributes the surplus equitably among the claimants. After the sale has been confirmed, the person making the sale conveys to the purchaser,[3] or if the vendor and purchaser be the same person, the court, in its order confirming the sale, appoints a trustee to convey the property to the purchaser on the payment of the purchase money.[4] The mortgagee, or his assignee, or legal representatives, may purchase at the sale. All sales must be in the county or city where the premises are situated, and if in more than one county, the sale may be made in either. The purchaser on the confirmation of the sale may have a writ of possession

[1] A bond filed on the day of sale is presumed to have been filed before the sale. Hubbard *v.* Jarrell, 23 Md. 66.

[2] The proper time to take advantage of any failure to comply with the law is when the sale is reported. Gayle *v.* Fattle, 14 Md. 69. When the sale is confirmed it has all the judicial sanction that it could have if it had been made by virtue of an ordinary decree, and cannot be called in question in any collateral proceeding. Cockey *v.* Cole, 28 Md. 285; Morrill *v.* Gelston, 34 Md. 413.

[3] When the decree provides for a credit as to part of the purchase money, and the sale is made on credit and confirmed, but the purchaser waives the credit and pays the whole purchase money at once, no objection can be made that the deed is executed forthwith, before the expiration of the term of credit. Morrill *v.* Gelston, 34 Md. 413.

[4] Laws, 1874, p. 683.

against the mortgagor. On death of the mortgagee his interest vests in his executor or administrator, who may release in the same manner as the mortgagee could.

1741. Massachusetts. — Mortgages with powers of sale are almost exclusively used in this state. When a power of sale is contained in a mortgage and a conditional judgment has been entered the demandant may, instead of a writ of possession, have a decree entered that the property be sold pursuant to such power of sale.[1] The party selling must within ten days thereafter make a report under oath to the court, and the sale may be confirmed. But instead of such suit and decree the mortgagee, or his assignee, may give notice and sell in accordance with the power;[2] and within thirty days after selling he must file a copy of the notice and his affidavit setting forth his acts in the premises fully and particularly, in the office of the registry of deeds in the county or district where the property is situated.[3] If it appears by such affidavit that he has in all respects complied with the requisitions of the power, the affidavit, or a certified copy of the record of it, is admitted as evidence that the power of sale was duly executed.[4]

All statutes authorizing administrators, guardians, and trustees to mortgage real estate are construed as authorizing the giving of a mortgage containing a power of sale.[5]

No sale under a power is valid and effectual to foreclose the mortgage, unless previous notice of the sale shall have been published once a week, the first publication to be not less than twenty-one days before the day of sale, for three successive weeks, in some newspaper, if there be any, published in the city or town where the mortgaged premises are situated; but this requirement does not avoid the necessity of also giving notice of such sale in accordance with the terms of the mortgage.[6]

When a mortgage is foreclosed by a sale under a power or otherwise, and the person having a valid title to the estate is kept

[1] Gen. Stat. c. 140, §§ 38–44; and see St. 1868, c. 197. Trust deeds are very seldom used.

[2] This is the usual mode of proceeding; a suit and decree being very rare when there is a valid power of sale.

[3] The affidavit need not allege the rendering of an account, nor the disposition made of the purchase money. Childs *v.* Dolan, 5 Allen, 319.

[4] This provision respecting the record of an affidavit of the sale is held to be merely directory, and a sale is good, and the title valid, if no affidavit is ever made or recorded. Learned *v.* Foster, 117 Mass. 365; Burns *v.* Thayer, 115 Mass. 89; Field *v.* Gooding, 106 Mass. 310.

[5] Stat. 1873, c. 280.

[6] Acts, 1877, c. 215.

out of possession by any person without right, he may recover possession by the summary process provided for the recovery of lands unlawfully held by tenants.[1]

In a case in Massachusetts, decided in 1858, it was held that an agreement to give a mortgage does not require the giving of a mortgage with a power of sale, because such power was declared not to be an ordinary accompaniment of a mortgage.[2] But since the time of this decision this form of mortgage has come to be used almost to the complete exclusion of any other, and it seems doubtful at least whether this decision would hold good at the present time. There is no reason now, it would seem, why a power of sale should not be regarded here, as in England, a necessary incident to a mortgage; and that an agreement to give a mortgage, or a power by will or otherwise to raise money by a mortgage, implies the giving of a mortgage with a power of sale.

1742. Michigan.[3] — A mortgage containing a power of sale upon default may be foreclosed by advertisement. To entitle the party to give notice and to make such foreclosure, it is requisite: 1st. That some default shall have occurred; 2d. That no suit shall have been instituted at law to recover the debt or any part of it; or if instituted, that it has been discontinued, or that execution has been returned unsatisfied in whole or in part; and 3d. That the mortgage has been duly recorded, as well as any assignment of it; 4th. If given to secure the payment of money by instalments, each instalment after the first is deemed a separate and independent mortgage, and may be foreclosed for each instalment in the same manner, and with like effect, as if given for each separate instalment.[4]

[1] Acts, 1879, c. 237.

[2] Brayton *v.* N. E. Coal Mining Co. 11 Gray, 493. And see Platt *v.* McClure, 3 Wood. & M. 151.

[3] Compiled Laws, 1871, pp. 1921–1925. Trust deeds in the nature of mortgages seem not to be in use.

[4] Formerly, a foreclosure under a power of sale for one instalment forever discharged the land of the mortgage. Kimmell *v.* Willard, 1 Doug. 217. Now under the statute one instalment, by reason of falling due sooner, has no preference over the others. All the instalments stand upon the same basis, in like manner as several mortgages given at the same time, and it makes no difference whether they are all owned together or by different parties. If the sale be expressly made subject to the other instalments, the effect is to charge the land in the hands of the purchaser with the payment of these; but if not so made, though the sale may bar the equity of redemption of the mortgagor and subsequent purchasers, it only transfers to the purchaser one instalment of the mortgage and leaves the others unaffected. There is no redemption by one as against the other. McCurdy *v.* Clark, 27 Mich. 445.

Notice is given by publishing the same for twelve successive weeks, at least once in each week, in a newspaper printed in the county where the premises, or some part of them, are situated, if there be one; and if no newspaper be printed in such county, then such notice shall be published in a paper published nearest thereto. The notice must specify: 1st. The names of the mortgagor and of the mortgagee, and assignee, if any; 2d. The date of the mortgage, and when recorded; 3d. The amount claimed to be due at the date of the notice; and 4th. A description of the mortgaged premises, conforming substantially with that contained in the mortgage.

The sale must be at public vendue, between the hour of nine o'clock in the forenoon and the setting of the sun, at the place of holding the circuit court within the county in which the premises to be sold, or some part of them, are situated, and must be made by the person appointed for that purpose in the mortgage, or by the sheriff, under sheriff, or a deputy sheriff of the county, to the highest bidder. The sale may be postponed from time to time, by inserting a notice of such postponement as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until the time to which the sale is postponed, at the expense of the party requesting such postponement. If the premises consist of different farms, tracts, or lots, not occupied as one parcel, they must be sold separately, and no more can be sold than may be necessary to satisfy the amount due on the mortgage, at the date of the notice of sale, with interest, and the costs and expenses allowed by law.[1] But if distinct lots be occupied as one parcel, they may in such case be sold together.[2] The mortgagee, his assigns, or his or their legal representatives, may, fairly and in good faith, purchase the premises so advertised, or any part thereof, at such sale. The officer or person making the sale must forthwith execute and deliver to the purchaser a deed of the premises, specifying the precise amount for which such parcel was sold, and must indorse thereon the time when such deed will become operative, in case the premises are not redeemed according to law, and must deposit the same with the register of deeds of the county in which the

[1] The deed in such case must show the price of each parcel, and not one sum for all. Lee *v.* Mason, 10 Mich. 403.

[2] Laws, 1875, No. 29, p. 26. See Grover *v.* Fox, 36 Mich. 461.

land is situated, as soon as practicable and within twenty days after such sale.[1]

Unless the premises are redeemed within the time limited for such redemption, as hereinafter provided, such deed thereupon becomes operative and may be recorded, together with any memorandum of cancelment of a portion of the same which may have been entered thereon by the register, and vests in the grantee all the right, title, and interest, which the mortgagor had at the time of the execution of the mortgage, or any time thereafter, except as to any parcels redeemed; but prior liens are not in any way prejudiced or affected. The premises may be redeemed within one year from the time of the sale, by paying to the purchaser, or his assigns, or to the register of deeds, for the benefit of such purchaser, the sum which was bid, with interest from the time of the sale, at the rate per cent. borne by the mortgage, not exceeding ten per cent. per annum, whereupon the deed becomes void; but in case any distinct lot or parcel separately sold is redeemed, leaving a portion of the premises unredeemed, then the deed is inoperative merely as to the parcel or parcels so redeemed, and as to those not redeemed is valid. Upon the payment of the entire sum bid at the sale and interest to the register of deeds, or upon delivering to such register a certificate, signed and acknowledged by the person entitled to receive the same, setting forth that such sum and interest have been paid, the register thereupon destroys the deed, and enters in the margin of the record of such mortgage a memorandum that the mortgage is satisfied; or in case one or more parcels are redeemed, it is the duty of the register to enter upon the face of the deed a memorandum that the same is inoperative as to the parcels redeemed, and to enter in the margin of the record of the mortgage a memorandum that the same is satisfied as to the parcels redeemed.[2] Any surplus must be paid to the mortgagor, his personal representatives or assigns, unless a claim for it shall have been filed with the officer, whereupon the officer is required to pay the surplus to the register of the circuit court in chancery for the county, and the claim is thereupon heard and adjudged in that court.[3]

Any party desiring to perpetuate the evidence of any sale may procure: 1st. An affidavit of the publication of the notice, to be

[1] See Grover *v.* Fox, 36 Mich. 461.

[2] Acts, 1877, No. 129, p. 118.

[3] Acts, 1877, No. 115, p. 101.

made by the printer of the newspaper in which it was inserted, or by some one in his employ; 2d. An affidavit of the fact of sale by the auctioneer, stating the time and place of it, the sum bid, and the name of the purchaser. Such affidavits must be recorded; and the original affidavits or the record of them, and certified copies, are presumptive evidence of the facts therein contained.[1]

When any person continues in possession of any premises after the expiration of the time limited by law for redemption, summary proceedings may be had to recover possession.

1743. Minnesota. Every mortgage of real estate, containing a power of sale, upon default being made, may be foreclosed by advertisement within ten years after the maturity of such mortgage or the debt secured. To entitle any party to make such foreclosure, it is requisite: that some default in a condition of such mortgage has occurred, by which the power to sell has become operative; that no action or proceeding has been instituted at law to recover the debt then remaining secured by such mortgage or any part thereof; or if the action or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied in whole or in part; that the mortgage containing such power of sale has been duly recorded, and if it has been assigned, that all the assignments have been recorded. When a mortgage is given to secure the payment of money by instalments, each of the instalments, either of principal or interest, mentioned in such mortgage, may be taken and deemed to be a separate and independent mortgage, may be foreclosed in the same manner, and with like effect, as if such separate mortgage was given for each of such subsequent instalments, and a redemption of any such sale by the mortgagee has the like effect as if the sale for such instalment had been made upon an independent mortgage. In such case, if the mortgaged premises consist of separate and distinct farms or tracts, only such tract or tracts are sold as are sufficient to satisfy the instalment then due, with interest and costs of sale; but if said premises do not consist of such separate and distinct farms or tracts, the whole is sold, and in either case the proceeds of such sale, after satisfying the interest or instalment of the principal due, with interest and costs of sale, must be applied

[1] An affidavit made seven or eight years after the sale is not such presumptive evidence. Mundy *v.* Monroe, 1 Mich. 68.

towards the payment of the residue of the sum secured by said mortgage, and not due and payable at the time of such sale; and if such residue does not bear interest, such application is made with a rebate of the legal interest for the time during which the residue shall not be due and payable; and the surplus, if any, is paid to the mortgagor, his legal representatives or assigns.

Notice that such mortgage will be foreclosed by sale of the mortgaged premises, or some part of them, is given by publishing the same for six successive weeks, at least once in a week, in a newspaper printed and published in the county where the premises intended to be sold, or some part thereof, are situated, if there is one; if not, then in a newspaper printed and published in an adjoining county, if there is such a newspaper; if there is not, then in a newspaper printed and published in the county to which the county in which the premises are located is attached for judicial purposes, if there be such a newspaper; if there is not, then in a newspaper printed and published at the capital of the state. In all cases, a copy of such notice must be served in like manner as a summons in civil actions in the district court, at least four weeks before the time of sale, on the person in possession of the mortgaged premises, if the same are actually occupied. Proof of such service may be made, certified, and recorded in the same manner as proof of publication of a notice of sale under a mortgage. Every notice must specify: the names of the mortgagor and of the mortgagee, and the assignee, if any; the date of the mortgage when recorded; the amount claimed to be due thereon, and taxes, if any, paid by the mortgagee at the date of the notice; a description of the mortgaged premises, conforming substantially to that contained in the mortgage; the time and place of sale. The sale is at public vendue, between the hour of nine o'clock in the forenoon and the setting of the sun, in the county in which the premises are to be sold, or some part thereof are situated, and is made by the sheriff of said county, or his deputy, to the highest bidder. Such sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until the time to which the sale is postponed, at the expense of the party requesting such postponement. If the mortgaged premises consist of separate and distinct farms or tracts, they must be sold separately, and no more farms or

tracts shall be sold than are necessary to satisfy the amount due on such mortgage at the date of notice of such sale, with interest, taxes paid, and costs of sale. The mortgagee, his assignee, or his or their legal representatives, may fairly and in good faith purchase the premises so advertised, or any part thereof, at such sale. The officer is required to make and deliver to the purchaser a certificate, under his hand and seal, containing a description of the mortgage under which such sale is made; a description of the real property sold; the price paid for each parcel sold separately; the date of the sale and the name of the purchaser, and the time allowed by law for redemption. Said certificate must be executed, proved, or acknowledged, and recorded as required by law for a conveyance of real estate, within twenty days after such sale. Such certificate, so proved, acknowledged, and recorded, upon the expiration of the time for redemption, operates as a conveyance to the purchaser or his assignee of all the right, title, and interest of the mortgagor in and to the premises named therein, at the date of such mortgage, without any other conveyance whatever.

The mortgagor, his heirs, executors, administrators, or assigns, whose real property is sold, may, within twelve months after such sale, redeem such property, as hereinafter provided, by paying the sum of money for which the same was sold, together with interest on the same from the time of such sale. No redemption can be made for real property sold when the mortgage foreclosed contains a distinct rate of interest, more than seven per cent. per annum, unless the party entitled to redeem shall pay, within the time provided, the sum for which said property was sold, together with interest thereon from date of sale to the time of redemption, at the rate specified in the mortgage, not to exceed ten per cent. per annum. When no rate of interest is specified in the mortgage, the rate of interest after sale is seven per cent. per annum on the amount for which the property was sold. Redemption is made as follows: The person desiring to redeem is required to pay to the person holding the right acquired under such sale, or for him to the sheriff who made the sale, or his successor in office, the amount required by law for such redemption, and to produce to such person or officer a certified copy of the docket of the judgment, or the deed of conveyance or mortgage, or of the record or files, evidencing any other lien under which he claims a right to redeem, certified by the officer in whose custody such docket, record, or

files shall be; any assignment necessary to establish his claim, verified by the affidavit of himself or the subscribing witness thereto, or of some person acquainted with the signature of the assignor; and an affidavit of himself or his agent, showing the amount then actually due on his lien. The person or officer from whom such redemption is made is required to make and deliver to the person redeeming a certificate under his hand and seal, containing: the name of the person redeeming, and the amount paid by him on such redemption; a description of the sale for which such redemption is made, and of the property redeemed; and stating upon what claim such redemption is made; and if upon a lien, the amount claimed to be due thereon at the date of redemption. Such certificates must be executed and proved, or acknowledged and recorded, as provided by law for conveyances of real estate, and if not so recorded within ten days after such redemption, such redemption and certificate are void as against any person in good faith making redemption from the same person or lien. If such redemption is made by the owner of the property sold, his heirs or assigns, such redemption annuls the sale; if by a creditor holding a lien upon the property or any part thereof, said certificate, so executed and proved or acknowledged and recorded, operates as an assignment to him of the right acquired under such sale, subject to such right of any other person to redeem as is or may be provided by law. If no such redemption is made, the senior creditor having a lien, legal or equitable, on the real estate, or some part thereof, subsequent to the mortgage, may redeem within five days after the expiration of the said twelve months, and each subsequent creditor, having such lien, within five days after the time allowed all prior lien holders as aforesaid, may redeem by paying the amount aforesaid, and all liens prior to his own, held by the party from whom redemption is made. But no creditor is entitled to redeem, unless, within the year allowed for redemption, he files notice of his intention to redeem in the office of the register of deeds where the mortgage is recorded.

The interest acquired upon any such sale is subject to the lien of any attachment, or judgment duly made and docketed, against all persons holding the same, as in case of real property, and may be attached or sold on execution in the same manner. If, after sale of any real estate made as prescribed, there remains in the hands of the officer making the sale any surplus money after satis-

fying the mortgage on which such real estate was sold, and payment of the tax and cost of sale, the surplus is paid over by said officer, on demand, to the mortgagor, his legal representatives or assigns. Any party desiring to perpetuate the evidence of any sale made in pursuance of the provisions of this chapter may procure an affidavit of the publication of the notice of sale, and of any notice of postponement, to be made by the printer of the newspaper in which the same was inserted, or by some person in his employ knowing the facts; and an affidavit of the facts of any sale pursuant to such notice to be made by the person who acted as an auctioneer in the sale, stating the time and place at which the same took place, the sum bid, and the name of the purchaser, which affidavit may be taken and certified to by any officer authorized by law to administer oaths. Such affidavit is recorded at length by the register of deeds of the county in which the premises are situated, in a book kept for the record of deeds, and such original affidavits; the record thereof, and certified copies of such record, are presumptive evidence of the facts therein contained. A record of the affidavits as above provided, and of the certificates executed on the sale of the premises, is sufficient to pass the title thereto, and the conveyance is an entire bar of all claims or equity of redemption of the mortgagor, his heirs and representatives, and of all persons claiming under him or them, by virtue of any title subsequent to such mortgage. Within ten days after foreclosure of any mortgage under the provisions of this act, the party foreclosing, or his attorney, must make and file with the register of deeds in the county where the property is located an affidavit of costs and disbursements, including attorney's fees embraced in the foreclosure sale, and that the same has been absolutely and unconditionally paid or incurred. The mortgagor, his heirs or assigns, at any time within one year after foreclosure, may recover from the owner of the mortgage at the time of foreclosure three times the amount of any costs or disbursements not absolutely paid for said foreclosure, and three times the amount of any bonuses or interest over and above twelve per cent. embraced in such foreclosure, and for which the property was sold, unless said surplus has been paid to the mortgagor or his assigns.[1]

A mortgage containing a power of sale may be foreclosed con-

[1] Laws, 1878, c. 53. For act empowering foreign executors and administrators to foreclose by advertisement, see Laws, 1876, c. 41.

formably to the requirements of the statute, without regard to requirements of the power, that the mortgagee should enter and take possession of the premises before selling; that the sale should be on the premises, and that the mortgagee should furnish an account of the sale to the mortgagor.[1] Whether the statute be mperative, so that a foreclosure conducted in accordance with the power when this provides a different mode than that in the statute, the court do not decide in the case referred to. In New York a similar statute seems to have been held imperative.[2]

1744. Mississippi. — Power of sale mortgages and trust deeds are in use. At first it was thought that the power could not be exercised without the aid of a court of chancery;[3] but this aid was very soon dispensed with, and sales under the power held effectual to bar the equity of redemption.[4] All lands sold under and by virtue of any deed of trust or mortgage must be divided into tracts not to exceed one hundred and sixty acres, and sold in such subdivisions as under judicial sales, whenever the debtor shall demand this of the trustee or mortgagee, and such a mode of sale is not in conflict with the terms of the contract expressed in the deed of trust.[5]

1745. Missouri. — A deed of trust is the usual form of giving security upon real estate; but a mortgage with a power of sale in the mortgagee or his agent is a form of security often used, and has been repeatedly recognized by the courts as valid. Such a power may be conferred upon a county as mortgagee, and may be enforced by it.[6] Deeds of trust in the nature of mortgages at the option of the *cestuis que trust*, their executors or administrators, or assignees, may be foreclosed by them, and the property sold in the same manner, in all respects, as in the case of mortgages;[7] and all real estate which may be sold by the trustees, or any one representing them in any deed of trust hereafter made, according to the terms of said deed, without the said deed of trust having been first foreclosed according to this section, and which shall be bought in at said sale by the *cestui que trust* or his assignee, or by any other person for them or either of them, shall be subject to redemption by the grantor in said deed, or his executors, administrators, or assigns, at any time within one year

[1] Butterfield *v.* Farnham, 19 Minn. 85.

[2] Lawrence *v.* Farmers' Loan & Trust Co. 13 N. Y. 200.

[3] Ford *v.* Russell, 1 Freem. Ch. (Miss.) 42.

[4] Sims *v.* Hundly, 3 Miss. (2 How.) 896.

[5] Laws, 1876, p. 37.

[6] Mann *v.* Best, 62 Mo. 491, 495.

[7] Wagner's Stat. 954, § 2.

from the date of said sale, on payment of the debt and interest secured by said deed of trust, and all legal charges and costs incurred in making said sale up to the time of redemption; and at such sale the purchaser shall receive a certificate of purchase setting forth the property sold and amount of purchase money received, which certificate shall be delivered to the trustee upon the application for a deed at the expiration of twelve months. Security must be given to the satisfaction of the circuit court for the payment of the interest to accrue after the sale, and for all damages and waste that may be occasioned or permitted by the party whose property is sold.[1]

It is provided that after the decease of a person who has given a deed of trust or mortgage, with power of sale, no sale shall take place within nine months after his decease.[2] Mortgages with powers of sale in the mortgagee, and sales made in pursuance of them, are valid and binding upon the mortgagors, and all persons claiming under them, and forever foreclose all right and equity of redemption of the property sold.[3] Where a trustee in any deed of trust to secure the payment of a debt or other liability dies, resigns, or becomes disabled, the court, on application of any person interested in the debt stating the facts by his affidavit,[4] makes an order appointing the sheriff of the county trustee to execute the deed of trust in place of the original trustee, and he thereupon has all the rights and powers of such trustee, and may sell and convey the property according to the terms of the deed of trust and with the same effect.[5]

1746. Montana Territory. — It is provided that upon the death of any person, who has given a deed of trust or mortgage with power of sale, no sale shall take place under such deed or mortgage within five months afterwards.[6]

[1] Meyer's Sup. 1877, p. 295.

[2] Wagner's Stat. 1872, p. 94. This applies only to deeds made by the decedent, and not to those made by prior owners. Lass *v.* Sternberg, 50 Mo. 124. "Deeds of trust as used in this state are of comparatively recent origin." McKnight *v.* Wimer, 38 Mo. 132.

[3] Wagner's Stat. p. 956.

[4] The application and affidavit cannot be made by the maker of the deed. A debtor cannot foreclose his own mortgage. An appointment so made would be void. Major *v.* Jackson, 51 Mo. 196.

[5] Ib.; Stat. p. 1347. In such case, as the sheriff acts in his official capacity, he may sell by deputy. Tatum *v.* Holliday, 59 Mo. 422. See McKnight *v.* Wimer, 38 Mo. 132, for a provision in the deed to same effect as the statute. No notice to the grantor is necessary. Martin *v.* Paxson, 66 Mo. 260.

[6] Laws, 1872, p. 343.

1747. Nebraska. — It would seem that power of sale mortgages and trust deeds can be foreclosed only by action, as in the case of common mortgages. But this question does not appear to have been decided. Such mortgages and deeds are not usual.[1]

1748. Nevada. — Power of sale mortgages and trust deeds are not in use, as foreclosure must in all cases be by action and judicial sale.[2]

1749. New Hampshire. — Power of sale mortgages and trust deeds are seldom used.

1750. New Jersey. — Power of sale mortgages and trust deeds are unusual, but sales made by virtue of the powers in these instruments are fully sustained.[3]

1751. New York.[4] — Mortgages containing a power to the mortgagee or any other person to sell the mortgaged premises, upon default, may be foreclosed by advertisement; provided no suit has been instituted at law to recover the debt, or if any has been instituted that it has been discontinued, or the execution upon the judgment rendered in such suit has been returned unsatisfied in whole or in part; and provided the power of sale or the mortgage containing it has been duly recorded.[5]

Notice is given: 1st. By publishing the same for twelve weeks successively, at least once in each week,[6] in a newspaper printed

[1] Webb *v.* Hoselton, 4 Neb. 308.

[2] § 1348.

[3] Clark *v.* Condit, 18 N. J. Eq. 358.

[4] 3 R. S. 1875, pp. 847–850. Fay's Dig. of Laws, 1876, vol. 2, pp. 65–67.

These provisions do not apply to mortgages made upon real estate not situated in this state. So far as concerns the jurisdiction of this state, the parties may agree in such mortgages upon such terms of sale under the power as they please. Elliott *v.* Wood, 45 N. Y. 71; S. C. 53 Barb. 285.

To make a sale valid under the statute it must be strictly followed, as the effect of it is to deprive the holder of the equity of his title. Sherwood *v.* Reade, 7 Hill, 431; reversing S. C. 8 Paige, 633; Hubbell *v.* Sibley, 5 Lans. 51; Cohoes Co. *v.* Goss, 13 Barb. 137. If the power contain provisions inconsistent with statute, as by providing for a private sale, the statute regulations must be followed. Lawrence *v.* Farmers' Loan & Trust Co. 13 N. Y. 200. The proceedings must be had in the name of the actual holder of the mortgage. Cohoes Co. *v.* Goss, *supra.*

[5] Where judgment was recovered on a debt payable by instalments, and execution was issued on the first instalment but afterwards satisfied, it was held that there could be no statute foreclosure on a second instalment for which no execution had been issued. Grosvenor *v.* Day, Clarke, 109. If the premises are situate in more than one county, the mortgage must be recorded in each. Wells *v.* Wells, 47 Barb. 416. The record is for the benefit of the purchaser and a sale without it is valid. Wilson *v.* Troup, 2 Cow. 195; Jackson *v.* Colden, 4 Cow. 266.

[6] A publication once in each week is sufficient, though the first publication is 85 days, and the last 8 days, before the

in the county where the premises are situated; or if situated in two or more counties, in a newspaper printed in either of them.[1] 2d. By affixing a copy of such notice, at least twelve weeks prior to the time therein specified for the sale, on the outward door of the building where the county courts are directed to be held in the county where the premises are situated;[2] or if there be two or more of such buildings, then on the outward door of that which shall be nearest to the premises. 3d. By serving a copy of such notice, at least fourteen days prior to the time therein specified for the sale, upon the mortgagor or his personal representatives,[3] and upon the subsequent grantees and mortgagees of the premises whose conveyance and mortgage shall be upon record at the time of the first publication of the notice,[4] and upon all persons having a lien,[5] by or under a judgment or decree upon the mortgage premises, subsequent to said mortgage, personally or by leaving the same at their dwelling-houses in charge of some person of suitable age, or by serving a copy of such notice

sale. Howard *v.* Hatch, 29 Barb. 297. If the first publication be defective, there may be a republication for the required time. Cole *v.* Moffitt, 20 Barb. 18. The publication is a good service upon an unknown party though an infant. Wheeler *v.* Scully, 50 N. Y. 667.

[1] In New York city, under authority of an act passed in 1874, c. 656, the Daily Register has been designated by the judges of the courts of record as the paper in which legal notices are to be published.

[2] If the land lies in several counties, the notice must be posted in each county. Wells *v.* Wells, 47 Barb. 416.

[3] Notice should be given to the executor or administrator, not to the heirs or devisees. Anderson *v.* Austen, 34 Barb. 319; Low *v.* Purdy, 2 Lans. 422.

In case the mortgage was executed by husband and wife, the notice of sale after the death of the husband must be served on the wife as surviving mortgagor; though not necessary to bar her dower in a purchase money mortgage. King *v.* Duntz, 11 Barb. 191; and see Brackett *v.* Baum, 50 N. Y. 8. "Personal representatives" means executors or administrators, and not heirs. Anderson *v.* Austin, 34 Barb. 319; Low *v.* Purdy, 2 Lans. 422.

[4] An assignee of a junior mortgage is entitled to notice. Winslow *v.* McCall, 32 Barb. 241; Wetmore *v.* Roberts, 10 How. Pr. 51.

A party in interest who is not served with notice is not affected or barred by the sale. Wetmore *v.* Roberts, 10 How. Pr. 51; Root *v.* Wheeler, 12 Abb. Pr. 294; Northrup *v.* Wheeler, 43 How. Pr. 122.

If the owner of the equity of redemption be not served with notice, *quare*, whether the foreclosure is not a nullity as to all parties. Mickles *v.* Dillaye, 15 Hun (N. Y.), 296.

[5] The lien of a judgment perfected after the first publication of notice, and before sale, is not cut off unless notice is served upon the judgment creditor as here provided. Groff *v.* Morehouse, 51 N. Y. 503. See, also, Klock *v.* Cronkhite, 1 Hill, 107; Winslow *v.* McCall, 32 Barb. 241. Though one judgment creditor has no notice, the sale is not therefore invalidated as to others who were served with notice. Hubbell *v.* Sibley, 5 Lans. 51.

upon said persons, at least twenty-eight days prior to the time therein specified for the sale, by depositing the same in the post-office,[1] properly folded and directed to the said persons at their respective places of residence.[2] The notice must specify[3] the names of the mortgagor and mortgagee, and the assignee of the mortgage, if any; the date of the mortgage and where recorded,[4] or where the power of sale is registered; the amount claimed to be due thereon, at the date of the first publication;[5] and a description of the mortgaged premises, conforming substantially with that contained in the mortgage.[6]

The sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and con-

[1] The notice may be mailed at any place in the state. Stanton *v.* Kline, 11 N. Y. 196; Bunce *v.* Reed, 16 Barb. 347. The twenty-eight days are to be counted from the time of deposit in the post-office, without reference to the mailing. Hornby *v.* Cramer, 12 How. Pr. 490. A mistake in addressing a party at a place other than his residence renders the sale void as to him. Robinson *v.* Ryan, 25 N. Y. 329.

[2] A notice addressed to A. B., administrator, is sufficient, without naming the estate of the deceased. George *v.* Arthur, 2 Hun, 406; S. C. 4 T. & C. 635. If it does not appear, except on information and belief, that the mortgagors resided at the place to which the notices were addressed and mailed, the proceedings are defective. Mowry *v.* Sanborn, 7 Hun (N. Y.), 380.

The three modes of giving notice must be used together. If one of them be omitted the foreclosure is void. Cole *v.* Moffitt, 20 Barb. 18; Stanton *v.* Kline, 16 Barb. 9; King *v.* Duntz, 11 Barb. 191; Van Slyke *v.* Shelden, 9 Barb. 278; Low *v.* Purdy, 2 Lans. 422; Mowry *v.* Sanborn, 62 Barb. 223.

[3] It need not state that the mortgage will be foreclosed. Leet *v.* McMaster, 51 Barb. 236; or that the sale is for the purpose of foreclosure. Judd *v.* O'Brien, 21 N. Y. 186.

[4] The place of record is sufficiently specified by stating the clerk's office and the date of record, though the number of the book in which it is recorded is erroneously stated. 5 Wait's Practice, 253; Judd *v.* O'Brien, 21 N. Y. 186, 188.

[5] A mistake as to the amount due does not invalidate the sale. Klock *v.* Cronkhite, 1 Hill, 107; Jencks *v.* Alexander, 11 Paige, 619; Bunce *v.* Reed, 16 Barb. 347; Mowry *v.* Sanborn, 62 Barb. 223.

If only a part of the debt is due, it is well to state both the amount due and the whole amount also. Jencks *v.* Alexander, 11 Paige, 619, 626.

[6] The statute does not require any reference in the notice of sale to incumbrances. If matters not called for by the statute are stated, which are calculated to mislead the public and prevent persons from bidding, the sale will be void; but if inserted by mistake merely, and a correction is published with the notice before it could be presumed that persons wishing to bid would be misled, the error would not vitiate the sale. Such an error was the statement of a prior incumbrance at twice its actual amount. Hubbell *v.* Sibley, 5 Lans. (N. Y.) 51; and see Klock *v.* Cronkhite, 1 Hill, 107; Burnet *v.* Denniston, 5 Johns. Ch. 35, 42. For form of notice, see 5 Wait's Prac. 254.

tinuing such publication until the time to which the same is postponed.[1]

The sale must be at public auction,[2] in the daytime, in the county where the mortgaged premises or some part of them are situated. If the premises consist of distinct farms, tracts, or lots, they must be sold separately, and no more sold than is necessary to satisfy the amount due on the mortgage with interest and costs.[3]

The mortgagee, his assignor, his or their legal representatives, may fairly and in good faith purchase the premises or any part thereof at such sale.

The sale pursuant to the power, and properly conducted, is equivalent to a foreclosure and sale under decree of a court of equity, so far as to be a bar of the equity of redemption of the mortgagor, and of all persons claiming under him;[4] and also of any person having a lien by judgment subsequent to the mortgage, who has been served with notice of the sale.

Affidavit of the fact of the sale pursuant to the notice may be made by the auctioneer, stating the time and place of sale, the sum bid, and the name of the purchaser, and annexed to a printed copy of the notice of sale. An affidavit of the publication of the notice may be made by the printer of the newspaper,[5] or by his foreman or principal clerk; and an affidavit of the affixing of a copy of the notice on the door of the court-house may be made by the person who affixed the notice, or by any person who saw such notice so posted, during the time required;[6] and an affidavit by the clerk of the county court of the affixing of a copy of the notice in a book provided for the purpose, or by any person who saw the

[1] It is not necessary to serve notice of postponement; the publication is sufficient. Westgate *v.* Handlin, 7 How. Pr. 372.

[2] A private sale, though expressly authorized by the mortgage, would not bar the equity of redemption. Lawrence *v.* Farmers' Loan & Trust Co. 13 N. Y. 200, 642.

[3] See Cox *v.* Wheeler, 7 Paige, 248.

[4] Demarest *v.* Wynkoop, 3 Johns. Ch. 129; Mowry *v.* Sanborn, 62 Barb. 223; Klock *v.* Cronkhite, 1 Hill, 107. A mortgage for the purchase money not being subject to the dower right of the mortgagor's wife, though not a party to it, a sale under the power is a bar to the right. It may be regarded as claiming under him. Brackett *v.* Baum, 50 N. Y. 8. Notice must be served upon her. Service upon her husband alone is not enough. Northrup *v.* Wheeler, 43 How. Pr. 122.

[5] Or publisher. Bunce *v.* Reed, 16 Barb. 347.

[6] A notice once affixed is presumed to remain, and the affidavit may be made by one who saw it posted twelve weeks prior to the sale. It is not necessary that he should have seen it each week. Hornby *v.* Cramer, 12 How. Pr. 490.

notice so affixed during the time required, and an affidavit of the service of the notice on the persons entitled to service, may be made by the persons who served the same.[1] The affidavits properly taken and recorded are presumptive evidence of the facts therein contained.[2]

When the premises or any part of them are purchased by the mortgagee, his legal representatives, or his or their assigns, or by any other person or persons whatsoever, the affidavits are evidence of the sale, and of the foreclosure of the equity of redemption, without any conveyance being executed, in the same manner and with the like effect as a conveyance executed by a mortgagee upon such sale to a third person.[3]

Any surplus arising from the sale is subject to the jurisdiction and order of the Supreme Court, which may dispose of it according to the rights of those interested.[4]

1752. North Carolina. — Power of sale mortgages "have long been in general use unquestioned."[5] Deeds of trust are also in use.

[1] An affidavit on information and belief as to the place of residence of the mortgagors, to whom notice was mailed, is sufficient, in the absence of proof that they did not receive the notices, or that they resided elsewhere. Mowry *v.* Sanborn, 62 Barb. 223. The holder of the mortgage may give the notice, though he be the purchaser. Hubbell *v.* Sibley, 5 Lans. 51.

[2] The affidavits are not conclusive; they may be disproved. Bunce *v.* Reed, 16 Barb. 347; Sherman *v.* Willett, 42 N. Y. 146; Mowry *v.* Sanborn, 62 Barb. 223; S. C. 72 N. Y. 534.

For form of affidavits see 5 Wait's Prac. 258, 261. The recording of the affidavits is not essential to the passing of title. Howard *v.* Hatch, 29 Barb. 297; Frink *v.* Thompson, 4 Lans. 489; overruling the dictum in Cohoes Co. *v.* Goss, 13 Barb. 137; also dictum in Tuthill *v.* Tracy, 31 N. Y. 157. See, also, Bryan *v.* Butts, 27 Barb. 503. But the affidavits must show a full compliance with the statute, and the omission of a fact which the statute requires to be shown by affidavit cannot be supplied by amendment of it, though perhaps new affidavits might be filed. Dwight *v.* Phillips, 48 Barb. 116.

[3] Walsh *v.* Colden, 4 Cow. 266; Slee *v.* Manhattan Co. 1 Paige, 48.

The affidavits in such case stand in place of a deed, and are conclusive as against the mortgagor and those claiming under him. Arnot *v.* McClure, 4 Denio, 41; Cohoes Co. *v.* Goss, 13 Barb. 144; Layman *v.* Whiting, 20 Barb. 559; Mowry *v.* Sanborn, 68 N. Y. 153.

[4] The mortgagee himself is not responsible to subsequent lien creditors for a surplus left in the hands of a purchaser. Russell *v.* Duflon, 4 Lans. 399. For proceedings in relation to surplus, see 5 Wait's Prac. 264.

But if the mortgagee receive the surplus he is liable to subsequent lien holders; though not for interest on it until demand. Russell *v.* Duflon, *supra;* Bevier *v.* Schoonmaker, 29 How. Pr. 411.

[5] Hyman *v.* Devereux, 63 N. C. 624, 628; Blount *v.* Carroway, 67 N. C. 396; Paschal *v.* Harris, 74 N. C. 335; Olcott *v.* Bynum, 17 Wall. 44. A "stay law," providing that no property should be sold under a deed of trust or mortgage until the

1753. Ohio. — Power of sale mortgages and trust deeds are seldom used.

1754. Oregon. — Power of sale mortgages and trust deeds are seldom used.

1755. Pennsylvania. — Power of sale mortgages and trust deeds were seldom used until quite recently, but have now become a common mode of creating marketable securities on which to raise loans for corporations.[1]

1756. Rhode Island. — Mortgages generally contain a power of sale. Trust deeds being less effectual are not in common use as security for loans.

At any sale by public auction made according to the provisions of any mortgage, or other conveyance by way of mortgage, or of any power of sale contained in it or annexed to it, the mortgagee, his heirs, or assigns, or any person for him, may fairly and in good faith bid for and purchase the property or any part of it, in the same manner as other persons may bid for and purchase it; provided, that notice in writing of his intention to bid shall be given to the mortgagor, or left at his last and usual place of abode, twenty days prior to the time of sale at which he proposes to bid as mortgagee, and that the proper evidence that such notice has been given shall be in the possession of the auctioneer at the time the sale takes place.[2]

1757. South Carolina. — Trust deeds seem to be in use. Power of sale mortgages though valid are not in common use.[3]

1758. Tennessee. — Power of sale mortgages and trust deeds are in use. Real estate sold under them by virtue of the power is subject to redemption at any time within two years in the same manner as when sales are made under judicial decree,[4] unless the right of redemption is expressly waived or surrendered in the deed or mortgage.[5] But if the mortgagee does not exercise a power of sale free from the equity of redemption contained in a

debts secured in the deeds are reduced to judgments, was held unconstitutional, as not only impairing the obligation of a contract, but altering it by adding a condition. Latham *v.* Whitehurst, 69 N. C. 33.

[1] Bradley *v.* Chester Valley R. R. Co. 36 Pa. St. 141, 151; Corpman *v.* Baccastow, Sup. Ct. of Pa. (1877) 5 N. Y. Weekly R. 204.

[2] Gen. Stat. of R. I. c. 166, § 15.

[3] Mitchell *v.* Bogan, 11 Rich. 686, per Withers, J.: "Not familiar in our observation."

[4] See § **1358**.

[5] Code, 1858, §§ 2124, 2125.

mortgage, and the sale be made under a decree of court, the right of redemption will still exist. The statute cutting off the equity of redemption must be strictly pursued.[1]

1759. Texas. — Trust deeds are in common use, and power of sale mortgages are also sometimes used.[2]

1760. Vermont. — A power of sale in a mortgage is unusual if not unknown, and there is no statute regulating its exercise.[3] Neither are trust deeds in use as a mode of securing debts.

1761. Virginia. — Trust deeds are used to the exclusion, almost, of all other forms of security upon real estate. It is provided that the trustee in such deed,[4] except so far as may be therein otherwise provided, shall, whenever required by any creditor secured, or any surety indemnified by the deed, or the personal representative of any such creditor or surety, after the debt due to such creditor, or for which such surety may be liable, shall have become payable and default shall have been made in the payment thereof, or any part thereof, by the grantor, sell the property conveyed by the deed, or so much thereof as may be necessary, at public auction, for cash, having first given reasonable notice of the time and place of sale, and shall apply the proceeds of sale, first to the payment of expenses attending the execution of the trust, including a commission to the trustee of five per cent. on the first three hundred dollars, and two per cent. on the residue of the proceeds, and then *pro rata* (or in the order of priority, if any, prescribed by the deed) to the payment of the debts secured and the indemnity of the sureties indemnified by the deed, and shall pay the surplus, if any, to the grantor, his heirs, personal representatives, or assigns.[5]

1762. West Virginia. — The form of trust deed and the duties

[1] Frierson *v.* Blanton, 57 Tenn. 272.

[2] Robertson *v.* Paul, 16 Tex. 472; Morrison *v.* Bean, 15 Tex. 267; Buchanan *v.* Monroe, 22 Tex. 537; McLane *v.* Paschal, 47 Tex. 365. See § 1792.

[3] Wing *v.* Cooper, 37 Vt. 169.

[4] "A deed of trust to secure debts or indemnify sureties may be in the following form, or to the same effect: —

"'This deed, made the day of , in the year , between (the grantor) of the one part, and (the trustee) of the other part, witnesseth: that the said (the grantor) doth (or do) grant unto the said (the trustee) the following property (here describe it). In trust to secure (here describe the debts to be secured or the sureties to be indemnified, and insert covenants or other provisions the parties may agree upon). Witness the following signatures and seals, (or signature and seal).'" Code, 1873, c. 113, § 5.

[5] Code, 1873, c. 113, § 6.

and compensation of the trustee under it are the same as above prescribed by the Code of Virginia.[1]

1763. Wisconsin.[2] — A mortgage containing a power of sale may upon default be foreclosed by advertisement; provided no action has been instituted at law to recover the debt, or if instituted that it has been discontinued, or that an execution upon the judgment has been returned unsatisfied in whole or in part; and provided the mortgage containing such power has been duly recorded, and that all assignments of it have been recorded. If the mortgage be payable by instalments, each instalment after the first is deemed a separate mortgage; and may be foreclosed for each instalment as if a separate mortgage were given for each.

Notice is given by publishing the same for six successive weeks, at least once a week, in a newspaper printed in the county where the premises or some part of them are situated, if there be one; otherwise in a newspaper published in an adjoining county, if there be one; but if not, then in a paper published at the seat of government. The notice must specify the names of the mortgagor and of the mortgagee, and of the assignee if any; the date of the mortgage and when recorded; the amount claimed to be due at the date of the notice; a description of the premises substantially as in the mortgage; and the time and place of sale.

The sale must be at public auction, between the hour of nine o'clock in the forenoon and the setting of the sun, in the county in which the premises or some part of them are situated, and must be made by the person appointed for that purpose in the mortgage, or by the sheriff or his deputy, to the highest bidder. The sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication to the time of sale. If the premises consist of distinct farms or lots, they must be sold separately; and no more shall be sold than may be necessary to satisfy the amount due, with interest and costs.

The mortgagee, his assigns, or his or their representatives, may fairly, and in good faith, purchase the premises, or any part thereof, at the sale.

[1] Code, 1870, c. 72, §§ 5–10, and amendments, 1870, c. 51.

[2] R. S. 1878, c. 152, §§ 3523–3543.

The officer or other person making the sale gives the purchaser a certificate in writing under seal, setting forth a description of each tract sold, the sum paid therefor, and the time when the purchaser will be entitled to a deed, unless redeemed; and within ten days files in the office where the deed is recorded a duplicate of such certificate. The premises may be redeemed within one year after such sale, on payment of the sum bid, with interest at the rate of ten per centum per annum from the time of sale; but the mortgagor may retain full possession, until the title vests absolutely in the purchaser. If not redeemed, the officer or some person appointed by the court for the purpose executes a deed of the premises to the purchaser, or to the assignee of the certificate.

Any surplus remaining after satisfying the mortgage is paid to the mortgagor or his assigns.

The evidence of sale may be perpetuated by an affidavit of the publication of the notice to be made by the printer, or by some person in his employ knowing the facts, and an affidavit of the fact of the sale to be made by the auctioneer, stating the time and place of sale, the sum bid, and the name of the purchaser; and such affidavits, when recorded, are presumptive evidence of the facts. The record of the affidavits, and of the deeds executed, pass the title, and the conveyance is a bar of all equity of redemption; but no title accruing prior to the execution of the mortgage is affected.

A subsequent mortgagee is entitled to the same privilege of redemption that the mortgagor might have had, or may satisfy the prior mortgage, and thereby acquire all the rights of the prior mortgagee.

When the premises, or any part of them, are purchased by the mortgagee, his representatives, or his or their assigns, the affidavits of publication, and of the circumstances of sale, are evidence of the sale, and of the foreclosure of the equity of redemption, without any conveyance being executed, in the same manner, and with like effect, as a conveyance executed by a mortgagee upon a sale to a third person.

When notice of the sale is published in other than the county in which the premises are situated, a copy of such notice must be served at least four weeks before the time of sale on the person in possession of the premises, in all cases where the same are occupied; and where they are not occupied, then upon the mortgagor,

his heirs, or personal representatives, if he or they reside in the county where such premises lie. Proof of the service of such notice may be made, certified, and recorded in the same manner, and with the like effect, as proof of the publication of a notice of sale under a mortgage.

CHAPTER XL.

POWER OF SALE MORTGAGES AND TRUST DEEDS.

I. The nature and use of powers of sale, 1764–1772.
II. The power of sale is a cumulative remedy, 1773–1776.
III. Construction of power, 1777–1791.
IV. Revocation or suspension of the power, 1792–1800.
V. When the exercise of the power may be enjoined, 1801–1820.
VI. Personal notice of sale, 1821–1826.
VII. Publication of notice, 1827–1838.
VIII. What the notice should contain, 1839–1856.
IX. Sale in parcels, 1857–1860.
X. Conduct of sale, terms, and adjournment, 1861–1875.
XI. Who may purchase at sale under power, 1876–1888.
XII. The deed and title, 1889–1903.
XIII. The affidavit, 1904, 1905.
XIV. Setting aside and waiving sale, 1906–1922.
XV. Costs and expenses, 1923–1926.
XVI. The surplus, 1927–1940.

1. *The Nature and Use of Powers of Sale.*

1764. In general. — The delay and expense incident to a foreclosure and sale in equity have brought power of sale mortgages and trust deeds into general favor both in England and America; and although their general use is now confined to a part only of our States, the same influences which have already led to their partial adoption and use are likely to lead to their general use everywhere at an early day. It is true that recent codes and statutes have done something to simplify the remedy by bill in equity; but at best the process of foreclosure by suit is cumbersome and expensive as compared with the remedy afforded by a power of sale. Preliminary to a bill in equity, or to a petition or suit authorized by codes which adopt a bill in equity as the basis of the proceeding, is an investigation to ascertain who have become interested in the property since the taking of the mortgage. All such parties, sometimes quite numerous, must be made parties to the suit and must be served with process, else the foreclosure will not be complete. The decree of sale may be rendered only after a long delay. The sale is made through a sheriff or officer of the court, who must report his proceedings to the court. Orders

must be obtained for the confirmation of the sale, and perhaps for the distribution of the proceeds of it. There may also be attendant references to ascertain the amount of the mortgage debt, or to determine whether the whole property shall be sold together or in separate parcels; or to determine in what order different parcels shall be sold in consequence of the equities of subsequent purchasers; or after the sale is made to determine whether the title is such that the sale can be enforced against the purchaser. It is true that all these proceedings are designed for the protection of the mortgagor and others who may be interested in the property; but while such protection is occasionally not without its use, in almost all cases the parties interested in the property are equally well protected by the remedy out of court afforded by a power of sale, and, as will be presently noticed, when protection is needed in exceptional cases the courts can be effectually appealed to.

A power of sale, whether vested in the creditor himself or in a trustee, affords a prompt and effectual security. Although it may press harder upon the debtor in point of time, it is not without its advantages to him. The delay and expense incident to a foreclosure suit he is obliged to pay for in some way; and it is generally in the way of paying a higher rate of interest for the loan. It is probably safe to say that in its practical operation the power of sale is not used to oppress or injure the debtor more frequently than is the process of foreclosure by suit. There is undoubtedly some prejudice against this form of security still remaining. This is more especially the case where it is little used, and in those parts of the country where capital is scarce and the difficulty of obtaining large sums of money without delay is a serious one. But both the fancied and real objections to powers of sale in mortgages and trust deeds are likely soon to give way under the real advantages they afford to both the debtor and creditor; and their general adoption, to the exclusion of other forms of security upon real property, may be looked for at an early day.

1765. In some of the early cases both in England and America, the validity of powers of sale in mortgages was much questioned. The case of *Croft* v. *Powell*[1] was for a considerable time considered as an authority against mortgages of this description, although their validity was not involved in the decision. This was a mortgage made by a deed and separate defeasance,

[1] 2 Comyn, 603 (1738).

which provided that if the loan was not paid within the time agreed, then the mortgagee should mortgage or absolutely sell the same lands free from redemption, and out of the money raised by such mortgage or sale pay the loan and interest, and be accountable for the overplus to the mortgagor or his heirs. The money not being paid at the time, the mortgagee agreed to convey the estate to a third person, and in the agreement and conveyance an exception was made, and the defeasance was mentioned. For this reason it was considered that it was not the intention of the mortgagee to give the purchaser an absolute and indefeasible estate, for it was not conveyed to him absolutely and free from the equity of redemption, but subject to the defeasance.

When Mr. Powell wrote his Treatise on Mortgages[1] he considered the validity of powers of sale "of too doubtful a complexion to be relied upon as the source of an irredeemable title." Even so late as 1825, although such powers had been sustained in the few cases in which they had been the subject of adjudications during the early part of the present century, Lord Eldon, then Chancellor of England, while not denying the validity of a mortgage in this form, strongly objected to it, saying: "Here the mortgagee is himself made the trustee. It would have been more prudent for him not to have taken upon himself that character. But it is too much to say that if the one party has so much confidence in the other as to accede to such an arrangement, this court is for that reason to impeach the transaction. It is next provided that if the mortgagor shall make default in paying the sum stated at the appointed time, the mortgagee may make sale and absolutely dispose of the premises conveyed to him. This is an extremely strong clause; but perhaps it may be one of the

[1] Powell on Mortg. 19.

"Their validity," says Mr. Coventry, "was at first much questioned, and when the doubts surrounding their introduction were removed, they were for a considerable time, and are even now, in some degree viewed as a harsh measure, and only to be used where the money lent approaches very nearly the value of the estate mortgaged, or where the interest is likely to run in arrear. A mortgage of this description is certainly a prompt, powerful security compared with the common mode of mortgaging. . . . . The evil of the former mode of mortgaging is, that the mortgagee, in proceeding for the recovery of his money, is liable to be delayed for an indefinite time in chancery. The new mode is framed with a view to a settlement out of court, so that a large portion of chancery practice will be abstracted from court if this mode of mortgaging becomes, as it bids fair to do, the only acknowledged mode of mortgaging in general use." Mortg. Prac. p. 150.

many new improvements in conveyancing which make conveyancing so different from what it was when I was in practice in that part of law." Here he inquired of Mr. Sugden how the practice was in that respect; Mr. Sugden admitted that the clause was usually inserted in deeds like the present. Lord Eldon: "How can it be right that such a clause should be introduced into a deed under which the party is a trustee for himself? Then there is a clause that it shall not be necessary for the purchaser to inquire whether a sale was proper, &c. Here, too, it must be recollected that this is a clause to be acted upon, not by a middle person, who is to do his duty between the *cestuis que trust;* but the mortgagee is himself made trustee to do all these acts. Upon the whole, I must say that this deed seems to me of a very extraordinary kind, and that there are clauses in it upon which it would be difficult to induce a court of equity to act." [1] It seems, however, that his observations were made without deliberation, and were not called for in the case before him. By general accord power of sale mortgages were about this time adopted into general use in England, and they have always been fully sustained and approved. At the present time every mortgage has a power of sale; for when not inserted in the deed, as is usually the case, a power of sale is supplied by statute.[2]

1766. The powers generally inserted in mortgages used in England are much more complete, and give a more speedy remedy after a default than the statute power, so that it is now the general understanding that there must be a power of sale, else the money is hardly obtainable upon the mortgage. For these reasons it is now held, contrary to the opinion formerly entertained,[3] that trustees, under a direction in a will to raise money by mort-

[1] Roberts *v.* Bozon, Chan. (Feb. 1825) MS., cited in Coventry's Prac. Mort. p. 150; 1 Powell's Mortg. (Am. ed.) 9 *a*, note.

[2] See § 1722.

[3] In Sanders *v.* Richards, 2 Coll. 568, it was held that an executor had no right to give a mortgage with a power of sale. This is overruled in the cases cited in the following note. In Clarke *v.* The Royal Panopticon, 4 Drew. 26, Vice-Chancellor Kindersley remarked: "It is said, that the practice of conveyancers is to treat a power of sale as a *necessary incident* to a mortgage; to introduce it universally. . . . . I admit that it is much more frequent than it used to be thirty or forty years ago. But it is by no means an *universal* practice; and many mortgages may be seen at this day, in which no power of sale is introduced." But waiving this, he held that a special power to a trustee to mortgage does not give him authority to sell, and *a fortiori*, does not give him a right to give another person power to sell.

gage, are authorized to give the mortgagee a power of sale in case of default in repayment of the money or the interest of it. In a recent case,[1] Sir R. Malins, V. C., said: "I am of opinion that a power of sale is a necessary incident to a mortgage, and that when a testator says that a sum of money is to be raised by mortgage, he means it to be raised in the way in which money is ordinarily raised by mortgage, and, therefore, that the mortgage may contain what mortgages in general do contain, namely, a power of sale." This is further illustrated by another case where a mortgage was made by a deposit of title deeds, with a written agreement by the mortgagor "to execute a mortgage" when called upon to do so.[2] He then sold and conveyed the estate subject to the mortgage; and afterwards executed a power of sale mortgage to his mortgagee, who subsequently sold the estate under the power. It was held that the purchaser was bound by the power of sale; the Master of the Rolls saying the "mortgage very properly contains a power of sale."

1767. It is not possible to say when powers of sale in mortgages were first used in this country; but it appears from a statute enactedin New York in the year 1774[3] that they were already in use at that time. The provisions of that statute were reënacted in the first revision of the statutes of that state, and under various modifications they have been continued to the present day. In Massachusetts, in 1826, Chief Justice Parker[4] said that a power to sell executed to one who relies upon such power, and expects and intends to purchase an absolute estate, would without doubt pass an unconditional estate to the purchaser; yet he says "this form of conveyance is rare in this country;" and

[1] In re Chawner's Will, L. R. 8 Eq. 569 (1869). In Bridges *v.* Longman, 24 Beav. 27, the Master of Rolls held that a power of sale is incident to a power to raise money by mortgage. See, also, to same effect, Selby *v.* Cooling, 23 Beav. 418; Russell *v.* Plaice, 18 Beav. 21; Cook *v.* Dawson, 29 Beav. 123, 128; Earl Vane *v.* Regden, L. R. 5 Ch. 663; Cruikshank *v.* Duffin, L. R. 13 Eq. 555, 560.

[2] Leigh *v.* Lloyd, 35 Beav. 455.

[3] Act of 19 March, 1774. From this statute it appears that doubts were then entertained whether sales under powers, by the mere act of the person to whom the power was granted, would extinguish the equity of redemption. After reciting the inconvenience of allowing them to be impaired, it declares that the rights of *bonâ fide* purchasers shall not be defeated. See, also, as to the early use of powers of sale in New York, Bergen *v.* Bennett, 1 Caines Cas. 1, 3; Doolittle *v.* Lewis, 7 Johns. (N. Y.) Ch. 45; Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48, 69; Lawrence *v.* Farmers' Loan & Trust Co. 3 Kern. (N. Y.) 200.

[4] In Eaton *v.* Whiting, 3 Pick. (Mass.) 484.

he cites the case of *Croft* v. *Powell*, decided almost a hundred years before, to the effect that if the purchaser knows the original nature of the transaction, and appears not to have purchased wholly without reference to the conditional character of the title, he will be compelled in equity to surrender it on receiving the money he has advanced.

In some early cases it had been contended that the power of sale so altered the character of the conveyance as to deprive it of the qualities of a mortgage; but in *Eaton* v. *Whiting* it was said that without doubt the power while unexecuted left the estate as it would have been if no power had been given.[1]

Fifty years ago power of sale mortgages were not in general use anywhere in this country; and although considerable use was made of them at an earlier time than any corresponding use was made of them in England,[2] they have been adopted in the latter country, to the exclusion of other forms of security, while they have not been so adopted here. Within the past half century, however, the use of them has rapidly extended, so that in several states any other form of mortgage is exceptional. The validity of these powers of sale is everywhere recognized, and the use of them, either in mortgages or in trust deeds, is becoming general.[3]

1768. **The use of power of sale mortgages, however, has not yet become so universal here** as to lead to their being regarded generally as a necessary incident of a mortgage. In New York it is true that as early as 1823 Chancellor Kent decided that a power of attorney to execute a mortgage authorized the making of it with a power of sale, because such a power was then one of the customary and lawful remedies given to a mortgagee; that it had become an incident to the power to mortgage, and was of course included under the authority to mortgage, unless specially excluded.[4] But if elsewhere the usage has become so established as to warrant a similar declaration, the question has not since been

[1] Taylor *v.* Chowning, 3 Leigh (Va.), 654; Turner *v.* Bonchell, 3 Har. & J. (Md.) 99.

[2] In Jackson *v.* Henry, 10 Johns. (N. Y.) 185, 196 (1813), a case upon a power of sale mortgage, Chief Justice Kent remarked: "There is no case precisely like this in the English books, because these powers are not in use in Great Britain."

[3] Turner *v.* Johnson, 10 Ohio, 204; Brisbane *v.* Stoughton, 17 Ohio, 482; Hyman *v.* Devereux, 63 N. C. 624, 628; Mitchell *v.* Bogan, 11 Rich. (S. C.) 686; Longwith *v.* Butler, 8 Ill. 32; Kinsley *v.* Ames, 2 Met. (Mass.) 29; Lydston *v.* Powell, 101 Mass. 77.

[4] Wilson *v.* Troup, 7 Johns. (N. Y.) Ch. 25.

presented to the courts for judicial determination. In Massachusetts, where the use of this form is now more nearly universal, probably, than in any other part of the country, it was held, in 1858, that a stipulation "to give a mortgage" was complied with by giving one without a power of sale; and that a power of sale was not then a usual accompaniment of a mortgage.[1] Since that time, however, there can be no doubt that a power of sale has become, not merely a usual accompaniment of a mortgage, but almost an invariable one; and it may be anticipated that, when the occasion arises, the court will hold, as have the courts in England, that a power of sale is a necessary incident to a mortgage.

Although in several states a mortgage is by statute or judicial interpretation declared to be a mere security for the payment of a debt, and not a conveyance of the legal title, yet this view of the nature of the security does not in any way interfere with, or impair, the doctrine of powers to sell.[2]

1769. Deeds of trust, as has already been noticed, are in legal effect mortgages.[3] Where a mortgage is regarded, in accordance with the common law doctrine, as a conveyance of the legal estate, a deed of trust is of course none the less a conveyance of the legal estate; the only difference of opinion on this point is whether in those states in which a mortgage is regarded as a mere lien, and not a conveyance of the legal estate, a deed of trust shall be held to vest the legal estate in the trustees. Generally, a deed of trust is in this respect held to have only the same effect as a mortgage; such being the decision in Iowa,[4] Nebraska,[5] Kansas,[6] and Texas.[7] But on the other hand, in Florida, and perhaps in other states, it is held that although a mortgage does not vest the legal estate in the mortgagee, a deed of trust is a conveyance which does vest the legal title in the trustee.[8]

As a general rule, upon the payment of a deed of trust satisfaction is entered on the margin in the same way that it is in the case of a mortgage, and a reconveyance is not necessary. The statutes upon this subject, although relating in terms to

[1] Capron *v.* Attleborough Bank, 11 Gray (Mass.), 492; Platt *v.* McClure, 3 Woodb. & M. 151.

[2] Calloway *v.* People's Bank of Bellefontaine, 54 Ga. 441, 449.

[3] § 62; Shillaber *v.* Robinson, 97 U. S. 68.

[4] Newman *v.* Samuels, 17 Iowa, 528, 535.

[5] Webb *v.* Hoselton, 4 Neb. 308; Kyger *v.* Ryley, 2 Ib. 20, 28.

[6] Lenox *v.* Reed, 12 Kans. 223.

[7] McLane *v.* Paschal, 47 Tex. 365.

[8] Soutter *v.* Miller, 15 Fla. 625; and see authorities cited by Judge Dillon, in Am. L. Reg. (N. S.) 655.

mortgages, embrace deeds of trust.[1] In like manner statutes relating to the recording of mortgages embrace deeds of trust without special mention of them.[2]

So substantially alike are a mortgage and a deed of trust given as security, that a railroad authorized to mortgage its property may do this by means of a deed of trust;[3] and a bank authorized to take a mortgage of lands may take a deed of trust for its use to trustees.[4] "The attributes of a deed of trust for such purposes," says Mr. Justice Walker, of Arkansas, in a recent case,[5] "and a mortgage with power of sale, are the same; both are intended as securities, and in a legal sense are mortgages; in both, the legal title passes from the grantor; but in equity he is, before foreclosure, considered the actual owner in both, and as broadly in one as the other; the grantor has the right to redeem, in other words the equity of redemption, which can only be barred by a valid execution of the power."

1770. A deed of trust is often preferred to a mortgage on account of the intervention of a disinterested person as trustee. It has already been noticed that Lord Eldon thought it quite objectionable that a mortgagee should himself be made the trustee to sell under the power. But Mr. Coventry, after quoting his remarks, expressed his own preference for a mortgage with a power of sale in the mortgagee. He thought the intervention of a trustee is in all cases a serious inconvenience; and that even if he does not become hostile to the creditor, he may, by his inexperience or squeamishness, subject him to much trouble; and he recommended that the mortgagee retain in his own hands absolute power over his own property. The objections to the intervention of a trustee are apt to come from the mortgagee, and he is generally in position to have his own choice in the matter. The mortgagor is apt to suppose that, in placing the exercise of the power in the hands of a disinterested third party, whose position

[1] Ingle *v.* Culbertson, 43 Iowa, 265; Woodruff *v.* Robb, 19 Ohio, 212; Smith *v.* Doe, 26 Miss. 291; Crosby *v.* Huston, 1 Tex. 239; McGregor *v.* Hall, 3 St. & P. (Ala.) 397. *Contra*, Wilkins *v.* Wright, 6 McLean, 340.

[2] Fogarty *v.* Sawyer, 23 Cal. 570; Magee *v.* Carpenter, 4 Ala. 469. See further on this subject an article by Judge Dillon, 2 Am. L. R. (N. S.) 641; Wilkins *v.* Wright, 6 McLean, 340; Bank of Commerce *v.* Lanahan, 45 Md. 396; Woodruff *v.* Robb, 19 Ohio, 212.

[3] Wright *v.* Bundy, 11 Ind. 398, 404.

[4] Bennett *v.* Union Bank, 5 Humph. (Tenn.) 612.

[5] Turner *v.* Watkins, 31 Ark. 429, 437.

in relation to it is merely that of a trustee, he secures for himself the protection of fair dealing. It generally happens, however, that the debtor has to pay for the services of a trustee, whose disinterestedness is no more than that of the creditor himself. The trustee is obliged to act, when the creditor secured by the deed has a legal right to call for the exercise of the power, and if he neglects or refuses to act, he may be compelled to do so or to give up the trust. The trustee may, when in doubt about his duty, apply to the court in equity to direct him.

This form of security has come into very general use in several states, and in Virginia and West Virginia, in particular, has come into universal use in securing debts upon real estate. In a recent case in the former state, Mr. Justice Rives, in the course of an able opinion holding unconstitutional, as applied to trust deeds, a law staying the collection of debts for a limited period, spoke of the nature and use of this security.[1] "What is a deed of trust? It is a form of security which has, in our practice, superseded the mortgage, and doubtless for the very reason that it does not require the intervention of the courts. The introduction of trustees, as impartial agents of the creditor and debtor, admits of a convenient, cheap, and speedy execution of the trust, and involves none of the expenses and delays attendant upon mortgages.

"At an early period it met with some resistance from the court and the bar, though feeble and ineffectual. It was deprecated as an engine of oppression in the hands of the creditor. It was denounced as a pocket judgment. . . . . It is now a favorite security for the payment of money, closely interwoven with the transactions of business, and firmly established by the practice of the country and the sanction of the courts. It has, doubtless, aided credit, facilitated the collection of debts, and saved to the debtor the costs of legal proceedings."

1771. The trustee in a deed of trust is the agent of both parties, and he should perform his duties with the strictest impartiality.[2] A failure to use reasonable diligence, or an abuse of his discretionary powers, renders him personally liable to the party injured for the damage done. Thus, if without authority he releases any part of the security, or after a sale of the property

[1] Taylor *v.* Stearns, 18 Gratt. 244, 278 (1868).

[2] Sherwood *v.* Saxton, 63 Mo. 78, and cases cited.

under the power improperly releases the purchaser from his bid, and subsequently sells for a less sum, he is liable to the beneficiary in an action at law for the damages sustained.[1] A sheriff or other officer acting in lieu of a trustee under authority of a statute acts in his official capacity, and for a breach of trust or failure of duty is liable upon his bond.[2]

1772. The debt secured by a deed of trust belongs *primâ facie* to the beneficiary named in the deed. When this is claimed by the trustee himself, the presumption against him derived from the deed must be overcome by the clearest proof; and the fact that the note and deed have been left in his possession is of little importance, especially when the beneficiary is a woman and a near relative.[3]

2. *The Power of Sale is a Cumulative Remedy.*

1773. Generally a power of sale does not affect the right to foreclose in equity, either by a strict foreclosure,[4] or by a judicial sale,[5] or to foreclosure in any way provided by statute for the ordinary foreclosure of mortgages, as by entry and possession, or by suit at law. The power is merely a cumulative remedy. It is one species of foreclosure; but it does not exclude jurisdiction in equity. The option, however, to proceed in equity lies wholly with the mortgagee. A resort to a court of equity is not necessary, except where made so by statute; it can be effectually exercised without the aid of the courts.[6] Even after the filing of a bill in equity to foreclose such a mortgage, and while the bill is pending, a sale may be made under the power.[7]

A resort to proceedings in equity is more frequent under deeds of trust than with mortgages. The creditor may sometimes be compelled to do this in order to control the adverse action of the trustee; and a trustee may sometimes do so in order to obtain the

[1] Sherwood *v.* Saxton, 63 Mo. 78, and cases cited.

[2] State *v.* Griffith, 63 Mo. 545. §§ 1745, 1785.

[3] Gimbel *v.* Pignero, 62 Mo. 240.

[4] Wayne *v.* Hanham, 9 Hare, 62; 20 L. J. 530; Slade *v.* Rigg, 3 Hare, 35; Cormerais *v.* Genella, 22 Cal. 116.

[5] Hutton *v.* Sealy, 4 Jur. N. S. 450; McGowan *v.* Branch Bank of Mobile, 7 Ala. 823; Marriott *v.* Givens, 8 Ala. 694, Carradine *v.* O'Connor, 21 Ala. 573; Wofford *v.* Board Police of Holmes Co. 44 Miss. 579; McAllister *v.* Plant, 54 Miss. 106; Fogarty *v.* Sawyer, 17 Cal. 589; Cormerais *v.* Genella, 22 Cal. 116; Atwater *v.* Kinman, Harr. (Mich.) 255.

[6] Hyde *v.* Warren, 46 Miss. 13.

[7] Brisbane *v.* Stoughton, 17 Ohio, 482.

direction of the court as to his duties. When a trustee under a trust deed enters into a collusive arrangement with the grantor in the deed and declines to execute the trust, and after instituting an action of ejectment to recover possession of the premises dismisses it against the wish of the beneficiary, a foreclosure may be had in chancery and a receiver may be appointed, upon showing the inadequacy of the security for the payment of the debt.[1] A court of equity, whenever a contingency arises which gives it jurisdiction and occasion to interfere, will at the instance of a *cestui que trust* control, restrain, and direct the exercise of the power.[2]

1774. The court will appoint a new trustee upon the death, inability, or declination of the trustee named in the deed of trust, upon the application of the persons interested in the execution of the trust, and of the author of the trust as well;[3] but they are all necessary parties to a bill to obtain such appointment. Although the person who made the trust deed has conveyed to another his interest in the premises, so long as he remains liable for the payment of the note secured by the deed, he is interested in the appointment of a proper person to sell the property in such manner as not unnecessarily to cause a deficiency. The purchaser from him is directly interested in the sale of the property, and is also a necessary party.[4]

So, also, when a trustee removes to a foreign country and there becomes a permanent resident, he incapacitates himself from discharging the duties of his trust and vacates his office. A new trustee may thereupon be appointed. Where a railroad mortgage provides that upon the death, removal, or incapacity of a trustee the majority of the bondholders may designate in writing a person to fill the vacancy, and the bondholders select a new trustee in place of one who has permanently removed from the state, the courts will recognize the new trustee, and restrain the other from acting.[5]

A trustee who has once accepted the trust is not allowed to lay it down without the assent of the beneficiary, or the decree of a

[1] Myers *v.* Estell, 48 Miss. 372.

[2] Youngman *v.* Elmira, &c. R. R. Co. 65 Pa. St. 278.

[3] Clark *v.* Wilson, 53 Miss. 119.

[4] Holden *v.* Stickney, 2 MacAr. (D. C.) 141.

[5] Farmers' Loan & Trust Co. *v.* Hughes, 11 Hun (N. Y.), 130.

court of equity;[1] but if within the jurisdiction of the court may be compelled to discharge the trust.[2]

The trust deed often makes provision for the filling of any vacancy that may occur in the office of trustee; and if the person who is to execute the trust and the event upon which he may execute it are distinctly described, he may act, and his acts will be valid. But if a power to appoint a new trustee be conferred by the deed upon the *cestui que trust*, his assignee cannot make a valid appointment; for this power of appointment is personal or in gross; is a confidence reposed in him which he cannot delegate to another, unless expressly authorized by the donor.[3]

1775. The sale is by virtue of the power and not of the decree when the court enforces the power. Upon the death of the trustee named in a deed of trust, a court of equity has power to appoint a new trustee to execute the power of sale, and to determine the amount of the debt secured by the trust; but a sale by such trustee professedly by virtue of the trust deed, made in pursuance of such decree, is not a sale made under a decree of foreclosure, but one made by virtue of the power in the trust deed.[4] It has been held in Virginia that such trustee cannot sell until the amount of the debt secured is ascertained; and that either party in interest may resort to a court of equity for this purpose.[5]

After ascertaining the amount the court may, in its discretion, dismiss the bill and leave the trustee to sell under the power, or may retain the case and have the trust executed under its own supervision. The court may also appoint a commissioner to make the sale instead of the trustee; but he must pursue the provisions of the deed as to the terms and mode of sale. The court cannot set aside the deed of trust in any respect.[6]

1776. When debt is unliquidated. — If the amount secured by the mortgage can be ascertained by calculation, there is no objection to a foreclosure under the power;[7] neither is there if it is

[1] Drane *v.* Gunter, 19 Ala. 731.

[2] Sargent *v.* Howe, 21 Ill. 148.

[3] Clark *v.* Wilson, 53 Miss. 119.

[4] Rice *v.* Brown, 77 Ill. 549; Holden *v.* Stickney, 2 MacArthur (D. C.), 141; Staats *v.* Bigelow, Ib. 367; Doolittle *v.* Lewis, 7 Johns. (N. Y.) Ch. 45; Beatie *v.* Butler, 21 Mo. 313.

[5] Wilkins *v.* Gordon, 11 Leigh (Va.), 547.

[6] Crenshaw *v.* Seigfried, 24 Gratt. (Va.) 272.

[7] Mowry *v.* Sanborn, 62 Barb. (N. Y.) 223; 68 N. Y. 153. See § **1812.**

conditioned for the delivery of certain specified articles, when a specified sum is authorized to be retained from the proceeds upon a breach of the condition.[1] It is then equivalent to a mortgage to secure the payment of a definite sum. But a mortgage given to secure and cover unliquidated damages cannot be foreclosed in this manner,[2] until the amount due under the mortgage has been ascertained. It has been held also that under a deed of trust if the amount of the debt secured be unliquidated and uncertain, a sale cannot be made under the power until the amount of the debt has first been determined in a court of equity.[3]

The objection that the sum secured is uncertain or unliquidated has particular force in those states in which there are statutory provisions that only so much of the estate as may be necessary to satisfy the mortgage debt shall be sold.

3. *Construction of Power.*

1777. The power to sell may not only be made by an instrument separate from the mortgage, but it may be to a third person, instead of the mortgage creditor; for instance, it may be in the form of a power of attorney to a third person; and such power when executed according to its terms effectually cuts off the equity of redemption.[4] Moreover a power in the mortgage or deed may be changed by a writing subsequently executed by the parties under seal.[5] A power of sale, though it should be expressly and fully conferred, may sometimes arise by necessary implication from the terms of the instrument.[6]

1777 *a*. A power of sale may in general be conferred by any owner of lands who has the legal capacity to convey them. A statute which provides that any married woman, above the age of eighteen years, joining with her husband, may make a valid mortgage or other conveyance of her real estate or of any interest therein, authorizes such married woman executing a mortgage or deed of trust in the manner provided to confer a power of sale, the exercise of which will effectually bar her equity of redemption.[7]

[1] Lockwood *v.* Turner, 7 Wend. (N. Y.) 458.

[2] Ferguson *v.* Kimball, 3 Barb. (N. Y.) Ch. 616; Mowry *v.* Sanborn, 68 N. Y. 153; Mosby *v.* Hodge, 76 N. C. 387.

[3] Wilkins *v.* Gordon, 11 Leigh (Va.), 547.

[4] Brisbane *v.* Stoughton, 17 Ohio, 482.

[5] Baldridge *v.* Walton, 1 Mo. 520.

[6] Purdie *v.* Whitney, 20 Pick. (Mass.) 25; Mundy *v.* Vawter, 3 Gratt. (Va.) 518.

[7] Barnes *v.* Ehrman, 74 Ill. 402.

Such a power is an irrevocable authority to aid in the alienation of the estate, and bears no analogy to covenants declared by the common law to be inoperative in the deed of a married woman.[1]

1778. **The parties may also make such provisions and regulations** about the sale of the property under the trust as they may choose; and the sale must be in accordance with the provisions of the power given. No particular form of words is necessary to constitute the power. The essential provisions of it should be clearly and fully expressed, for the title of the purchaser under the power rests upon the authority there given.[2] When in a trust deed the powers of the trustee are not strictly defined they rest largely in his discretion, and it is presumed that he will exercise them for the best interests of the *cestui que trust*.[3] Thus the deed usually designates the place of sale and the character of the notice of it to be given; but if the deed leaves these matters to the discretion of the trustee, a sale by him in the honest exercise of his judgment will be sustained.[4]

1779. **What is a sufficient power.** — A provision in a mortgage that if the mortgagor "shall fail to make the payment, the said mortgagee shall advertise twenty days, and sell enough of the estate herein conveyed to him to pay said amount then due, and the said mortgagor shall have the right to direct what shall be sold," is a sufficient power of sale, and may be executed without the aid of a court of equity.[5] The power of sale may even be contained in a deed of the land to the debtor. A stipulation in such deed that if the grantee fail to pay the notes given for the purchase money when due, the sheriff of the county acting at the time of default shall sell the land, give title to the purchaser, and pay the money to the grantor, or to the assignee or holder of any of the notes, confers a valid power of sale upon the sheriff, although the title to the land is in the grantee.[6]

1780. **Acceptance of trust.** — It is not requisite to the validity of a power in a trust deed that the person who is to execute the power shall signify his willingness to do so by joining in the deed, or by any formal writing.[7] Although the deed be delivered

[1] Barnes *v.* Ehrman, *supra*, per Scott, J.

[2] Græme *v.* Cullen, 23 Gratt. (Va.) 266. For form used in New England, see Crocker's Notes on Common Forms, 92.

[3] Ingle *v.* Culbertson, 43 Iowa, 265.

[4] Ingle *v.* Culbertson, *supra*.

[5] Hyman *v.* Devereux, 63 N. C. 624.

[6] Moore *v.* Lackey, 53 Miss. 85.

[7] Leffler *v.* Armstrong, 4 Iowa, 482;

to the *cestui que trust* and the trustee never has possession of it, yet his acting under the trust by advertising the property for sale is an acceptance of the trust by him.[1] Neither is it necessary that the *cestui que trust* should signify his assent by any formal writing. The deed being for his benefit, his assent is presumed.[2]

1781. An obvious error on the face of the power, such as a recital that "the party of the first part," who, according to the phraseology of the deed was the mortgagor, should proceed to sell, does not invalidate the power, when it appears from the whole instrument that the intention was to confer a power of sale on the mortgagee.[3]

1782. Prior entry when necessary. — Under a power in default of payment to "enter and take possession of said premises immediately, and sell and dispose of the same," a sale cannot be made without a previous entry and taking possession, or at least a demand for possession and a refusal;[4] but it is not necessary that the mortgagee should enter upon the premises at any other time, or in any other manner, than at the time of the sale and for the purposes of the sale. Such entry is authorized to enable the sale to be made upon the premises.[5]

1783. The fact that a mortgagee has made an entry for foreclosure, and taken rents and profits which are insufficient to discharge the debt, does not prevent his making a valid sale under a power of sale in the mortgage. The rents and profits received go to reduce the amount of the mortgage debt.[6]

1784. As against the mortgagor a sale under a power is good, although the mortgage or the power has not been recorded;[7] though now in several states in which the exercise of the power of sale is regulated by statute, it is provided that the mortgage or power shall be recorded. Under such provisions, if the premises consist of distinct lots situated in two or more counties, the mortgage must be recorded in each county, or the sale will be invalid as to the part in the county in which there was no record.[8] A valid sale may be made by the assignee of a mort-

Hipp *v.* Huchett, 4 Tex. 20; Flint *v.* Clinton Co. 12 N. H. 432.

[1] Crocker *v.* Lowenthal, 83 Ill. 579.

[2] Shearer *v.* Loftin, 26 Ala. 703.

[3] Gaines *v.* Allen, 58 Mo. 537.

[4] Roarty *v.* Mitchell, 7 Gray (Mass.), 243.

[5] Cranston *v.* Crane, 97 Mass. 459.

[6] Montague *v.* Dawes, 12 Allen (Mass.), 397. And see § **1268.**

[7] Wilson *v.* Troup, 2 Cow. (N. Y.) 195; Jackson *v.* Colden, 4 Cow. (N. Y.) 266.

[8] Wells *v.* Wells, 47 Barb. (N. Y.) 416.

gage containing a power of sale, although the assignment is not recorded till after the sale, if nobody is thereby misled.[1]

1785. Who may exercise the power. — In general any person in whom the legal estate or title under the mortgage is vested may sell under the power. So long as the mortgagee retains the mortgage the power must be exercised by him; and when it has been wholly assigned the assignee must exercise it.[2] If upon the face of the assignment it appears that it has been assigned only in part, the mortgagee and assignee should join in the sale.[3] But to create a valid power, or to make a valid execution of it, one must have a legal capacity to act and contract, and one under any legal disability, such as minority, can do neither.[4] A married woman may make a good power, or a valid execution of one.[5]

A deed of trust with a power of sale made to a sheriff and his successors in office is construed as conferring a power not upon the sheriff in his individual capacity; but in his official capacity, and his successors in office may execute it.[6]

1786. A power of sale may be executed by the administrator of the mortgagee, although in terms the power is given only to him, "his heirs or assigns."[7] The power being coupled with an interest passes to any one in whom the mortgagee's estate becomes vested, whether by assignment in fact or in law. It does not matter that the appointment of the executor or administrator is made in another state, as the power is a matter of contract and not of jurisdiction, although for the purpose of making the record title complete an appointment in the state where the land is situated is essential.[8] A surviving executor or administrator, if he retains authority under the will or by law to go on with the administration of the estate, may sell under the power.

1787. A legal assignment of the mortgage passes the power

[1] Montague *v.* Dawes, 12 Allen (Mass.), 397.

[2] Cohoes *v.* Goss, 13 Barb. (N. Y.) 137; McGuire *v.* Van Pelt, 55 Ala. 344.

[3] Wilson *v.* Troup, 2 Cow. (N. Y.) 195, 231.

[4] Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35.

[5] Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 129; Doolittle *v.* Lewis, 7 Johns. (N. Y.) Ch. 45; Young *v.* Graff, 28 Ill. 20.

[6] Beal *v.* Blair, 33 Iowa, 318; § 1771.

[7] Lewis *v.* Wells, 50 Ala. 198; Harnickell *v.* Orndorff, 35 Md. 341; Berry *v.* Skinner, 30 Md. 573; Collins *v.* Hopkins, 7 Iowa, 463; Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 125, 145; Johnson *v.* Turner, 7 Ohio, 568.

[8] Doolittle *v.* Lewis, 7 Johns. (N. Y.) Ch. 45; Averill *v.* Taylor, 5 How. (N. Y.) Pr. 476.

of sale unless there are words of restriction.[1] It does not matter that the assignment, though absolute in form, is in fact a security for a debt due from the mortgagee; but although such assignee may foreclose in the same way as any assignee, yet if he purchases at the sale, the mortgagee may redeem.[2] If by concurrence of the mortgagor the time of payment is extended, or the terms are otherwise changed,[3] the power remains unimpaired. The assignment of the note does not prevent a foreclosure in the name of the mortgagee for the use of the assignee.[4] But if the mortgagee commences the advertisement under the power, and before the sale assigns the mortgage to a third person, who continues the advertisement in the mortgagee's name instead of advertising anew, the sale is irregular and void.[5] An assignment which is not effectual either at common law or by statute, as, for instance, one made by an informal indorsement without any transfer of the note, does not operate to pass the power of sale to the assignee, but leaves it still in the mortgagee.[6]

The power of sale is usually vested in the mortgagee, "his executors, administrators, or assigns." If it is not given to his "assigns," then one who has taken a transfer of the mortgage cannot exercise it, although the deed empowers the "assigns," amongst others, to give a receipt for the purchase moneys obtained by such sale.[7] Where the power is to "assigns," a devisee of the mortgagee can exercise it; though he cannot if these words are omitted.[8] The word "assigns" is not regarded as meaning merely the persons whom the mortgagee may during his lifetime make such, but as meaning as well those whom he or his transferee may make such by will.[9]

An assignee of part of the mortgage notes with an assignment of the mortgage or so much thereof as secures the payment of the

[1] Bush *v.* Sherman, 80 Ill. 160; Cohoes Co. *v.* Goss 13 Barb. (N. Y.) 137; Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48; Bergen *v.* Bennett, 1 Caines (N. Y.) Cas. 1; Wilson *v.* Troup, 2 Cow. (N. Y.) 236; Pease *v.* Pilot Knob Iron Co. 49 Mo. 124; Pickett *v.* Jones, 63 Mo. 195; Harnickell *v.* Orndorff, 35 Md. 341; McGuire *v.* Van Pelt, 55 Ala. 344.

[2] Slee *v.* Manhattan Co. *supra.*

[3] Young *v.* Roberts, 15 Beav. 558.

[4] Bourland *v.* Kipp, 55 Ill. 376.

[5] Niles *v.* Ransford, 1 Mich. 338.

[6] Hamilton *v.* Lubukee, 51 Ill. 415.

[7] Bradford *v.* Belfield, 2 Sim. 264; Townsend *v.* Wilson, 1 B. & Ald. 608. In England it is now a common precaution to vest the power of sale also in all persons entitled to give a receipt for the mortgage debt. Fisher's Mortg. p. 504.

[8] Cooke *v.* Crawford, 13 Sim. 91; Macdonald *v.* Walker, 14 Beav. 556; Wilson *v.* Bennett, 5 De G. & S. 475.

[9] Titley *v.* Wolstenholme, 7 Beav. 425.

notes assigned, has an implied right to avail himself of the power of sale to collect the notes assigned.[1]

1788. In respect to the assignment of deeds of trust a different rule prevails, however. The trustee is a mere instrument to execute the purpose of the grantor, and he is clothed with the legal estate merely for this purpose. The trust is a confidence which cannot be delegated except as provided by the persons who created the trust; and a provision for this purpose must be express and beyond question. Therefore, it has been held that a trust deed to two persons, or the survivor of them, and the heirs and *assigns* of the survivor, could not be executed by another to whom the survivor conveyed the property, as the word "assigns" does not with certainty mean a person whom the trustee might make such by his own act during his life.[2]

1789. An equitable assignee cannot execute the power. The power must be strictly pursued, and it is presumed that the delegation of the power is induced by trust and confidence in the trustee. If the mortgage does not provide that an assignee may execute the power, the law does not confer it upon the assignee, and it can only be exercised by the mortgagee.[3] It may be exercised by an assignee if the power so provides, and the assignee is the legal assignee of the debt and mortgage.[4] But if the debt be not evidenced by an instrument assignable by law, nor in any way except by the mortgage itself, which is not assignable except in equity, then the mere assignment of the mortgage, as the courts of Illinois hold, passes only an equitable title to the debt, and the power does not pass to the assignee, and can be executed only by the mortgagee himself.[5] An assignee of the note alone cannot execute the power.[6] If the debt is of such a character that it may be legally assigned, so as to vest the legal title in the assignee, then the assignee himself must execute the power.[7] The legal assignee may make the sale in his own name, but the equitable

[1] Brown *v.* Delaney, 22 Minn. 349.

[2] Whittelsey *v.* Hughes, 39 Mo. 13; McKnight *v.* Wimer, 38 Mo. 132; and see Pickett *v.* Jones, 63 Mo. 195, 199.

[3] Flower *v.* Elwood, 66 Ill. 438; Wilson *v.* Spring, 64 Ill. 14.

[4] Heath *v.* Hall, 60 Ill. 344; Dill *v.* Satterfield, 34 Md. 52.

[5] Mason *v.* Ainsworth, 58 Ill. 163; Hamilton *v.* Lubukee, 51 Ill. 415. See § 826.

[6] Cushman *v.* Stone, 69 Ill. 516.

[7] Pardee *v.* Lindley, 31 Ill. 174; Strother *v.* Law, 54 Ill. 413; Sargent *v.* Howe, 21 Ill. 148; Wilson *v.* Troup, 2 Cow. (N. Y.) 197; Vansant *v.* Allmon, 23 Ill. 30.

assignee cannot.[1] Such assignee can avail himself of his assignment only in proceedings in equity.[2]

1790. A power in a mortgage or a trust deed to two or more jointly must be executed by all the donees. But if it provide that the grantees "or either of them" may sell, then the power may be exercised by one alone. It is the better practice, however, for the persons having a joint interest in a mortgage to join in the execution of the power of sale.[3] If there be two or more joint mortgagees or trustees, the power should be extended to the survivors and survivor of them, and the executors or administrators of such survivor, or their or his assigns. When the deed is without this provision for survivorship, on the death of one of the grantees, his executor or administrator must join in the execution of the power;[4] unless it appear otherwise from the deed that the interest was a joint one, and that the intention was that the security with all the advantage of the power should vest in the surviving mortgagee.[5]

The execution of the trust may be confided to one person alone, or to two or more jointly, or to two or more jointly and severally. If it be to several jointly, all must act in the execution of it; but if it be to them severally, or to either of them, then one alone may execute the trust. The deed itself is the authority for the execution of the trust, and it may contain such provisions about the execution of the trust as the parties see fit to make.[6] If the trust or power be given to two or more, it is joint unless there be words added which make it several also, or which show the grantor's intention to confide the execution of it to any number less than the whole. But upon the death of one or more of several trustees, under a deed of trust, the survivors take the entire legal estate, and may execute the trust, although there be no express provision to this effect in the deed.[7] Upon the death of the last trustee the title vests in his heir, until the appointment of a new

[1] Cushman *v.* Stone, 69 Ill. 516.

[2] Olds *v.* Cummings, 31 Ill. 188; Mason *v.* York & Cumberland R. R. Co. 52 Me. 82.

[3] Wilson *v.* Troup, 2 Cow. (N. Y.) 195, 331; White *v.* Watkins, 23 Mo. 423; Powell *v.* Tuttle, 3 Comst. (N. Y.) 396.

[4] Townshend *v.* Wilson, 3 Mad. 261.

[5] Hind *v.* Poole, 1 K. &. J. 383; 1 Jur. (N. S.) 371.

[6] Græme *v.* Cullen, 23 Gratt. (Va.) 266; Taylor *v.* Dickinson, 15 Iowa, 483.

[7] Hannah *v.* Carrington, 18 Ark. 85; Franklin *v.* Osgood, 14 Johns. (N. Y.) 527.

trustee by the court.[1] The estate is generally regarded as vesting in the new trustee by the appointment without a conveyance.[2]

1791. A first and second mortgagee may concur in a sale. In a case where this course was pursued objection was taken that the title under such sale was not marketable, because it was not clear under which power the property had been sold; but the Master of the Rolls said that as either mortgagee alone might have sold under his power, there was no reason why they could not combine together and sell.[3]

A trustee holding two deeds of trust executed by the same person for the benefit of the same creditor, each deed being for an undivided half of the land, should sell the whole together under both deeds, and not an undivided half under each deed at different times, as the presumption is that the property would command a better price if sold entire.[4]

4. *Revocation or Suspension of the Power.*

1792. The death of the mortgagor does not revoke a power of sale.[5] This being coupled with an interest in the estate cannot be revoked or suspended by the mortgagor. Of course, after his death the power cannot be exercised in his name, but the authority to execute it in the name of the grantee continues. The execution of the power is the grantee's act by virtue of the power. It is not a mere power of attorney.[6] In Texas, although the general principle is recognized that such a power cannot be revoked, yet the exercise of it is regarded as inconsistent with the statutes respecting the settlement of the estates of deceased persons, which require liens upon their property to be enforced in the probate

[1] Greenleaf *v.* Queen, 1 Peters, 138; Mauldin *v.* Armistead, 14 Ala. 708.

[2] Duffy *v.* Calvert, 6 Gill (Md.), 487; Goss *v.* Singleton, 2 Head (Tenn.), 67; Gibbs *v.* Marsh, 2 Met. (Mass.) 243, 253.

[3] McCarogher *v.* Whieldon, 34 Beav. 107.

[4] Coffman *v.* Scoville, 86 Ill. 300.

[5] Wright *v.* Rose, 2 S. & St. 323; Corder *v.* Morgan, 18 Ves. 344; Hunt *v.* Rousmanier, 8 Wheat. 174; 2 Mason, 244; Connors *v.* Holland, 113 Mass. 50; Varnum *v.* Meserve, 8 Allen (Mass.), 158; Brewer *v.* Winchester, 2 Allen (Mass.), 389; Bergen *v.* Bennett, 1 Caines (N. Y.) Cas. 1.

[6] Strother *v.* Law, 54 Ill. 413; Collins *v.* Hopkins, 7 Iowa, 463; Berry *v.* Skinner, 30 Md. 567; Hyde *v.* Warren, 46 Miss. 13, 29; Beattie *v.* Butler, 21 Mo. 313; De Jarnette *v.* De Giverville, 56 Mo. 440, 448; Bradley *v.* Chester Valley R. R. Co. 36 Pa. St. 141, 151; Bell *v.* Twilight, 2 Fost. (N. H.) 500. See Mansfield *v.* Mansfield, 6 Conn. 559, for a case of a naked power from a debtor to creditor.

court. Therefore, upon the death of the mortgagor or grantor in a trust deed, or of a purchaser from either, while holding the equity of redemption, the power cannot be exercised.[1] It then secures the creditor priority over such claims against the debtor's estate, as by the statute he is entitled to in the due course of administration. Expenses of last sickness, of administration and management of the estate, allowances in lieu of homestead and other property exempt from forced sale, and the homestead right itself, though released by the wife in the mortgage, take precedence of the mortgage debt.[2] A mortgage or trust deed may thus become of no value, and is a security that does not secure.

1793. The insanity of the mortgagor cannot of course have any greater effect in revoking or suspending the power of sale than his death would have.[3] Neither does an application by a guardian or committee of the lunatic, for an order to sell the mortgaged premises for the benefit of his creditors, have any effect to deprive the mortgagee of this summary means of realizing his claim.[4] Of course, if the mortgagee or any one else takes an unjust and improper advantage of such condition of the mortgagor, this will be ground for setting aside the sale.[5]

Neither does the bankruptcy of the mortgagor affect the mortgagee's authority to execute the power either in the mortgagor's name and as his attorney, or in the mortgagee's own name; for the assignee takes subject to the rights of the mortgagee.[6]

1794. Rule is the same in those states where, by statute or adjudication, a mortgage is regarded as a mere security for debt, passing no title or estate to the mortgagee; the power of sale is coupled with an interest and is irrevocable, just the same as it is where the common law doctrine, that the mortgage conveys the legal estate, still prevails.[7]

[1] Robertson *v.* Paul, 16 Tex. 472; Buchanan *v.* Monroe, 22 Tex. 537.

[2] McLane *v.* Paschal, 47 Tex. 365; Batts *v.* Scott, 37 Tex. 59. The allowance for homestead is not to exceed $5,000. Thompson on Homesteads, § 611. See, also, §§ 324–328 of same. No reliance should be placed upon a mortgage or deed of trust upon property in this state under its present laws.

[3] Encking *v.* Simmons, 28 Wis. 272.

[4] Berry *v.* Skinner, 30 Md. 567; Davis *v.* Lane, 10 N. H. 156.

[5] Encking *v.* Simmons, *supra.*

[6] Hall *v.* Bliss, 118 Mass. 554; Dixon *v.* Ewart, 3 Meriv. 322; Story on Agency, § 482.

[7] Calloway *v.* People's Bank of Bellefontaine, 54 Ga. 441 (1875). In this case this subject is ably considered by Mr. Justice McCay: "A blended system of law and equity makes of a mortgage what it, in fact, is in practice, notwithstanding the

1795. A power may be modified and extended without revoking it. A mortgage deed contained a power of sale providing that if default should be made in payment of the interest, or any part of it, for a month after it became due, or in the payment of the principal on the appointed day, then the mortgagee might sell. After it became due he called for payment, and the mortgagor arranged with other parties for a loan of the money upon an assignment of the mortgage, which was executed with a recital that in the mortgage "a power of sale is contained for the better securing of the principal sum and interest, but the said power has not been, and is not intended to be, exercised," and reciting the calling in of the mortgage moneys and the mortgagor's arrangement with the assignees to loan the amount. The assignment, which was by an indenture executed by all the parties, confirmed the moneys "and all powers and remedies for recovering the same sums respectively," and conveyed the estate in fee subject to redemption. The time of payment was extended seven years, and the assignees covenanted that no sale should be made without three months' notice. There was a power of sale to arise upon default. On account of intervening incumbrances it was desirable on a subsequent default to sell under the power in the original mortgage rather than that in the assignment. It was held that the recitals were not intended to extinguish the original power, but only to modify and postpone the exercise of it; and that a sale could be made under it.[1]

formal rules of law. Neither this court nor the Code has said that the mortgagee has no interest. The language is, it passes no title. This was true in equity in England, and yet a mortgagee was constantly recognized as having an interest, and an interest, too, in the land. So far as that interest was concerned, he was treated as a purchaser, and not as a general creditor, even by judgment. . . . . We see nothing in this declaration of the Code, that a mortgage is only a security, that negatives the idea that a power of sale in a mortgage is a power coupled with an interest. The two ideas are just as consistent and harmonious as the idea of the English chancery court, as to the nature of a mortgage, was with a power of sale. Indeed, it is mainly in chancery courts, all of which treat a mortgage as only a security, and uniformly recognize the property to belong to the mortgagee, that the whole doctrine of powers to sell attached to a mortgage, is expounded and announced." In a previous case in the District Court of the United States for Northern Georgia, Lockett *v.* Hill, 1 Woods, 552 (1873), the judge, in view of the Code and decisions of the state that a mortgage passes no title, and is only a security for a debt, argued that the power of sale is not coupled with an interest, but is a collateral power only, and expires with the life or bankruptcy of the mortgagor. The argument seems forced.

[1] Boyd *v.* Petrie, L. R. 7 Ch. App. 385. Though in England it is usual in the transfer of a mortgage to provide expressly for

1796. **A conveyance by the mortgagee of a part of the premises is no waiver** of his right to sell under the power. A mortgagee, under a mistaken belief that he was the absolute owner, having conveyed a part of the mortgaged premises by deed with covenants of warranty, was held nevertheless to possess the right to foreclose the mortgage under a power of sale, because his conveyance did not amount to an assignment of the mortgage, and the purchaser took the title subject to the mortgage.[1] If he should himself become the purchaser under the power of sale, he would be estopped to claim, as against his grantee under his deed of warranty, the land so conveyed by him. A conveyance in the same way of the whole estate would doubtless be held to be an assignment of the mortgage which would carry with it the power. Neither does a mortgagee waive his right to sell by an entry to foreclose, and the taking of rents and profits insufficient to pay the debt.[2] The power to sell generally continues so long as the debt remains unpaid.

1797. **The pendency of a bill to redeem** by a subsequent incumbrancer would not, it would seem, suspend the power to sell;[3] for in this way the very object of the power, which is to afford a speedy remedy without the delay of a suit, would be defeated. The incumbrancer may protect himself by purchasing at the sale; or by enforcing his claim upon the surplus proceeds of the sale when his title can be fully investigated, without keeping the mortgage creditor waiting for his money. But when the first mortgagee has refused a tender of the amount due on his mortgage from a subsequent mortgagee, who thereupon brought a suit to redeem, and the first mortgagee proceeded to sell under his power, upon a *primâ facie* case that the subsequent mortgagee was entitled to redeem, the first mortgagee was restrained from assigning his mortgage, and from selling under it, until the hearing of the case on the bill to redeem.[4]

The power of sale is not suspended for the reason that the mortgagee has resorted to a process of garnishment to collect the mortgage debt. The several remedies upon a mortgage being

the continuance of the power, this is not essential, as a general assignment of all covenants and securities will carry it. Young *v.* Roberts, 15 Beav. 558.

[1] Wilson *v.* Troup, 2 Cow. (N. Y.) 195.

[2] Montague *v.* Dawes, 12 Allen (Mass.), 397.

[3] Adams *v.* Scott, 7 W. R. 213.

[4] Rhodes *v.* Buckland, 16 Beav. 212.

collateral and independent, the remedy under the power of sale is not affected by any other proceeding to enforce the debt, unless this has resulted in a partial or complete satisfaction of it.[1]

1798. A tender of the amount due and payable upon a mortgage, after breach of the condition and before the sale, does not, according to the rule adopted in Massachusetts, defeat the right to sell under the power, because the right to sell attaches at once, and as it is a power coupled with an interest, it cannot be revoked. The tender is merely the foundation for a suit in equity for redemption. A sale under the power after a tender made and not accepted transfers the legal title and possession; but the mortgagor may preserve his right to redeem against a purchaser, by giving him notice before or at the sale of the tender. Until he is restored to the legal right of possession by a decree of court in equity, he can neither maintain nor defend a writ of entry against one claiming under the mortgage. The foreclosure is complete by the sale nothwithstanding the tender. And unless the mortgagor proceeds in equity to redeem, the purchaser is entitled to possession and may recover it by a writ of entry, although he purchased with full knowledge that after breach and before the sale the mortgagor tendered the whole amount due under the mortgage.[2] If, however, a tender be made at the time stipulated in the condition of the mortgage, the right to sell is thereby defeated, and a sale would be void.[3]

1799. A different rule is adopted in the English courts, and in some of our state courts, which hold that upon a tender at any time before the sale is actually made, even after the property has been put up at public auction, the mortgagee is bound to stop the sale.[4] If the mortgagee refuses the tender and goes on with the sale, the purchaser having knowledge of these circumstances, the court, instead of leaving the mortgagor to his remedy by bill to redeem, will set aside the sale. In other similar cases the court will restrain a sale and allow the mortgagor or other person interested in the equity to proceed with a bill to redeem. But a mere

1 Benjamin *v.* Loughborough, 31 Ark. 210.

2 Cranston *v.* Crane, 97 Mass. 459; and see Montague *v.* Dawes, 12 Allen (Mass.), 397.

3 § **886–893.**

4 Jenkins *v.* Jones, 2 Gif. 99; 6 Jur. N. S. 391; Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35; Cameron *v.* Irwin, 5 Hill (N. Y.), 272, 276. In **New York** and **Michigan** the lien is considered as discharged by the tender, so that no valid sale can afterwards be made even to a *bonâ fide* purchaser. § **893.**

offer without an actual tender of the amount due is not sufficient to prevent a sale; and the tender must include costs as well as interest.[1] A tender or even a payment in full of the debt, so long as the mortgage remains undischarged of record, does not prevent the making of a valid sale under the power to one who purchases in good faith without knowledge of the payment or tender.[2]

Where it is provided in a deed of trust that upon any default the whole amount of principal and interest shall be due forthwith, and the trustee may thereupon sell, the debtor is in equity entitled to have proceedings for a sale stopped upon a tender to the trustee before sale of the amount due together with costs accrued; and if the trustee proceeds nevertheless to sell, the sale may be set aside.[3]

1800. The power is not suspended by reason that the mortgagor is within the lines of an enemy at war with his country, if he voluntarily absented himself from home and became an alien enemy.[4] The publication of notice in accordance with the power is binding and effectual. Upon the same principle, an alien enemy who has voluntarily absented himself from home may be sued in the state of his former residence, and is bound by constructive notice in the same manner as any other non-resident.

[1] Whitworth *v.* Rhodes, 20 L. J. N. S. 105. See Grugeon *v.* Gerrard, 4 Y. & C. 119.

[2] Elliott *v.* Wood, 53 Barb. (N. Y.) 285; Warner *v.* Blakeman, 36 Ib. 501; affirmed 4 Keyes, 487; Brown *v.* Cherry, 38 How. (N. Y.) Pr. 352; 56 Barb. 635. See, however, Lycoming Ins. Co. *v.* Jackson, 83 Ill. 302.

[3] Whelan *v.* Reilly, 61 Mo. 565; Flower *v.* Elwood, 66 Ill. 438.

[4] Ludlow *v.* Ramsey, 11 Wall. 581. Mr. Justice Bradley said: "This case differs from that of Dean *v.* Nelson, 10 Wallace, 158, decided at the present term. In that case Nelson and his wife were driven out of Memphis by a military order and were not permitted to return, and the proceedings to foreclose their property took place during their enforced absence. The other defendant, May, was only nominally interested, and had always been within the Confederate lines. But if, as in this case, a party voluntarily leaves his country or his residence for the purpose of engaging in hostilities against the former, he cannot be permitted to complain of legal proceedings regularly prosecuted against him as an absentee, on the ground of his inability to return or to hold communication with the place where the proceedings are conducted."

That the existence of civil war did not exempt property of persons residing in the rebel states, located in the loyal states, from judical process, and foreclosure or sale under power of sale, for debts due to citizens of the latter states, see, also, Washington University *v.* Finch, 18 Wall. 1 Central Law Journal, 66 (1874); De Jarnette *v.* De Giverville, 56 Mo. 440; Martin *v.* Paxson, 66 Mo. 260; Harper *v.* Ely, 56 Ill. 179; Thomas *v.* Mahone, 9 Bush (Ky.), 111; Crutcher *v.* Hord, 4 Ib. 360; Seymour *v.* Bailey, 66 Ill. 288; Willard *v.* Boggs, 56 Ill. 163; Mixer *v.* Sibley, 53 Ill. 61; Hall *v.* Conn. Mut. L. Ins. Co. 68 Ill. 357; Bush *v.* Sherman, 80 Ill. 160.

The late civil war in this country was attended with all the consequences in this respect that an international or public war would have produced. The fact that a mortgagor was so situated within the enemy's lines that he could not receive the notice of sale, or appear in response to it, did not suspend the right of the mortgagee to enforce payment of his mortgage in accordance with its provisions.[1] In numerous cases it would be equally impossible, for other reasons, for the mortgagor to receive notice by publication.

Aside from the principle above stated as to the right to foreclose the property of alien enemies, the power of sale in a mortgage or trust deed being coupled with an interest and irrevocable may, at any time after the happening of the contingency in which it is to be exercised, be executed without regard to the circumstances or disabilities of maker of it at that time.[2] Immediately upon the happening of that contingency, it is the legal and moral right of the creditor to have the power of sale made for his benefit executed. The notice of sale required by the power is not for the benefit of the grantor in the sense of a notice to him of the sale of the land; for if that were the case, he could altogether defeat any sale by going to a place where the notice could

[1] Dorsey *v.* Dorsey, 30 Md. 522. After the decision of this case the case of Johnson *v.* Robertson, 34 Md. 165, came before the court, when, in consequence of the decision of the Supreme Court of the United States in Dean *v.* Nelson, 10 Wall. 158, the court overruled its former decision in Dorsey *v.* Dorsey, and held that a notice by publication to the mortgagor, while absent in the Confederate lines, was ineffectual to bind him, and that the sale under it was void. If the decision in Ludlow *v.* Ramsey, 11 Wall. 581, had then been made, the Supreme Court of Maryland would doubtless have adhered to its former decision.

[2] Washington University *v.* Finch, 18 Wall. 1 Central Law Journal, 66 (1874); De Jarnette *v.* De Giverville, 56 Mo. 440. Both of these cases relate to sales made by trustees under powers given in trust deeds while the grantors were alien enemies in the rebel states. In the former case Mr. Justice Miller said: "The debt was due and unpaid. The obligation which the trustee had assumed on a condition had become absolute by the presence of that condition. If the complainants had been dead, the sale would not have been void for that reason. . . . . If they had been in Japan, it would have been no legal reason for delay. . . . . The enforced absence of the complainants, if it be conceded that it was enforced, does not, in our judgment, afford a sufficient reason for arresting his agent and the agent of the creditor in performing a duty which both of them imposed on him before the war began." In the latter case, Wagner, Judge, said: "So far as the authority of the trustee was concerned to go on and make a sale of the property in satisfaction of the debt, it made no difference whether the grantors were in the Confederate lines or in the jungles of India, or even if they were dead."

not reach him; but it is intended rather to notify the community that the sale will take place. The grantor must be presumed to know that he is in default, and that his property is liable to be sold.

5. *When the Exercise of the Power may be enjoined.*

1801. Generally, the purpose for which the power of sale is given being to afford an additional and more speedy remedy for the recovery of the debt, the mortgagor is by his contract bound to exercise the necessary promptness in fulfilling it; and cannot complain of a legitimate exercise of the power.[1] If in any case it is attempted to pervert the power from its legitimate purpose, and to use it for the purpose of oppressing the debtor, or of enabling the creditor to acquire the property himself, a court of equity will enjoin the sale, or will set it aside after it is made.[2] Of course, so long as the creditor exercises only his legal right, although this be contrary to the wishes and interest of the mortgagor, the court will not interfere to enjoin a sale;[3] and as will be noticed presently more at length, a stronger case must be made to call for such interference than to set aside the sale afterwards.

1802. Legitimate exercise of power. — It frequently happens that the holder of a mortgage with a power of sale is requested by the mortgagor, or some other party in interest, to exercise it for the purpose of effecting a sale of the property; as when the title subsequent to the mortgage has become complicated by attach-

[1] "Such a power as this may no doubt be used for purposes of oppression, but when conferred, it must be remembered that it is so by a bargain between one party and another, and it is for the party who borrows to consider whether he is not giving too large a power to him with whom he is dealing." Per Cottenham, Lord Chancellor, in Jones *v.* Matthie, 11 Jur. 504.

[2] Davey *v.* Durrant, 1 De G. & J. 535; Robertson *v.* Norris, 1 Gif. 421; Jenkins *v.* Jones, 2 Gif. 99; Whitworth *v.* Rhodes, 20 L. J. N. S. 105; Close *v.* Phipps, 7 M. & G. 586.

"Wherever a power is given," said Sir J. Stuart, V. C., in Robertson *v.* Norris, 4 Jur. N. S. 155, "the court requires that the power shall be exercised with a view only to that which is the legitimate purpose for effecting which the power was conferred. The legitimate purpose for which the power to sell in this defendant's mortgage deed was given was to secure to him repayment of his mortgage money. If he uses the power to sell which he gets for that purpose for another purpose, from any ill motive, to effect means and purposes of his own, or to serve the purposes of other individuals, the court considers that to be what it calls a fraud in the exercise of the power, because it is using the power for a purpose foreign to the legitimate purposes for which it was intended." See S. C. affirmed, Ib. 443.

[3] Jones *v.* Matthie, *supra*.

ments, judgments, or other liens, so that it is not practicable to obtain releases from all persons having claims upon it; or where a sale, except under the power, has become impracticable because the subsequent liens upon it are greater than the value of the property. Sometimes under these or like circumstances a default is designedly permitted, in order to make the power exercisable and to cut off subsequent incumbrances. Doubts are sometimes expressed about the validity of sales made on such request, or with the knowledge on the part of the mortgagee that the purpose is to get rid of a subsequent lien; but it is conceived, that if the power is fairly exercised according to its terms, there is no impropriety in the arrangement. Certainly there is no such objection as to give occasion for the interference of the court to restrain the sale or to set it aside. "A man taking that which belongs to him, by means of the security which he has contracted for, does not act improperly in so doing, merely because one principal reason for his calling in the money is a wish to benefit another person. The case, however, might be different if it were part of the arrangement that the mortgage debt should be again lent to the purchaser." [1]

So long as the mortgagee is clearly within the authority given by the power, an intended sale will not be restrained although the exercise of it be harsh and improvident. The grounds for interference by injunction must be very strong, and must show that the injury likely to be sustained by the parties interested will be irreparable, or that a clear breach of trust will be committed by the intended sale.[2]

1803. A use of the power to obtain an advantage under another mortgage is not allowable. Where a mortgagee held two mortgages with powers of sale upon the same property, the subsequent mortgage, however, being of an undivided interest, and he threatened to foreclose under the first mortgage unless both mortgages should be paid, upon the filing of a bill to redeem from the first mortgage, and the payment of the money due upon it into court, he was enjoined from selling under that mortgage; because the power in that mortgage only existed for the purpose of securing that money, and the mortgagee could not be allowed

[1] Dart's Vendors & Purchasers, 5th ed. p. 75.

[2] Kershaw *v.* Kalow, 1 Jur. N. S. 974; Bedell *v.* McClellan, 11 How. (N. Y.) Pr. 172.

to proceed under that power in order to have an advantage in obtaining the money due on the second mortgage.[1]

1804. Grounds of interference must be alleged. — Courts of equity will interfere by injunction to prevent a sale under a power in a mortgage or trust deed, when by reason of fraud, want of consideration, or otherwise, the collection of the debt would be against conscience, and the sale would work a great and irreparable injury.[2] To warrant this interference the complainant must allege specifically the grounds on which the application is based; general statements and inferences from facts are not sufficient. An allegation that the mortgagor does not owe the note described in the mortgage, without stating why he does not owe it, is not sufficient to warrant the relief.[3] A statement that the proposed sale will materially embarrass and injure the petitioner is only a conclusion of his own, and of no consequence unless the facts are stated from which the court can determine what the injury will be.[4]

1805. The court will enjoin a sale only when the petitioner's rights are clear, or free from reasonable doubt. He must show also a good reason for asking the interference of the court. He must show that the mortgagee is about to proceed in an improper or oppressive manner, and not merely that he might adopt a different remedy.[5] In general a stronger case must be presented to the court to obtain an injunction against a proposed sale under the power, than to obtain a decree setting it aside after it is made.[6]

1806. Payment of the amount justly due under the mortgage must be tendered, to entitle the person seeking the injunction to the consideration of the court.[7]

1807. When the mortgage was void in its inception on account of fraud, undoubtedly a sale under the power may be enjoined. The bill in such case must clearly disclose the fraud and the proof clearly substantiate it. Where a mortgage by a corporation was of doubtful validity, on account of being made to the

[1] Whitworth *v.* Rhodes, 20 L. J. N. S. 105.

[2] Montgomery *v.* McEwen, 9 Minn. 103.

[3] Foster *v.* Reynolds, 38 Mo. 553.

[4] Montgomery *v.* McEwen, 9 Minn. 103.

[5] Bedell *v.* McClellan, 11 How. (N. Y.) Pr. 172.

[6] Kershaw *v.* Kalow, 1 Jur. N. S. 974.

[7] Sloan *v.* Coolbaugh, 10 Iowa, 31; Powell *v.* Hopkins, 38 Md. 1; Vechte *v.* Brownell, 8 Paige (N. Y.), 212; Meysenburg *v.* Schlieper, 46 Mo. 209.

directors themselves on their own vote, a sale was restrained until a hearing of the case.[1]

But the application must be made by the mortgagor upon whom the fraud was practised in obtaining the mortgage, and cannot be made by a purchaser from the mortgagor without paying the entire debt, although the holder of the mortgage had taken it as security for a less amount,[2] or although he had taken it with notice of the fraud.[3]

There may also be an injunction against the execution of the power by reason of circumstances arising after the making of the mortgage, in consequence of which the execution of it would be inequitable; but the court will not interfere in such cases except upon strong reasons.[4] The fact that part of the principal of the debt has been paid does not warrant an injunction against the sale, unless it be in restraint of selling more than enough to pay the amount due.[5]

1808. Usury. — It is no ground for enjoining a sale under a trust deed that the notes secured reserve usurious interest or include it, except in those states where usury renders the contract void. The trustee's duty to sell and to apply the proceeds in discharge of the debt legally due remains the same. If he should attempt to misapply the proceeds, and pay on account of usury what was not legally due, the court would then interfere.[6] Where usury does not invalidate the mortgage, a sale under the power will not be enjoined by reason of it unless the debtor brings into court the principal and the legal interest due.[7] In New York, however, where usury renders void the contract, a power of sale in a usurious mortgage is considered void, and a sale under it may be restrained.[8] If a sale be actually made to one having no notice of the usury, it will be upheld;[9] but one having such

[1] Southampton Boat Co. *v.* Muntz, 12 W. R. 330.

[2] Foster *v.* Wightman, 123 Mass. 100.

[3] Fairfield *v.* McArthur, 15 Gray (Mass.), 526; and see § 1303.

[4] Per Greene, C. J., in Frieze *v.* Chapin, 2 R. I. 429, 432.

[5] Powell *v.* Hopkins, 38 Md. 1.

[6] Tooke *v.* Newman, 75 Ill. 215. In Iowa it seems that an injunction would be allowed in such case upon tender of the amount due, less the usurious interest. Casady *v.* Bosler, 11 Iowa, 242; and so in Maryland: Walker *v.* Cockey, 38 Md. 75.

[7] Powell *v.* Hopkins, 38 Md. 1; Walker *v.* Cockey, 38 Md. 75; Casady *v.* Bosler, 11 Iowa, 242.

[8] Hyland *v.* Stafford, 10 Barb. (N. Y.) 558; Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35, 41.

[9] Jackson *v.* Henry, 10 Johns. (N. Y.) 185.

notice would not by such sale acquire any title.[1] Neither is it a ground for enjoining a sale under a power that the mortgagee in his notice claims a greater amount than was actually and legally due.[2]

In North Carolina it is declared that a mortgagee will be enjoined from selling when there is any suggestion of oppression arising from usury or the like.[3]

1809. Unconscionable penalty. — It has been said, however, that where a mortgage and note provide a penalty of a high rate of interest after maturity, such in amount that a court in equity would give relief against it as unconscionable, that the proper course is to obtain an injunction restraining a sale under the power until the amount actually due can be ascertained; because if a sale is allowed to be had under the power, the mortgagee may retain the full amount of the debt and penalty, and the mortgagor cannot recover back any part of it by action at law. The contract is not in itself illegal, and the only relief against it is upon equitable considerations.[4]

1810. A want of notice of the sale is no ground for enjoining it. The power of sale generally stipulates that it shall be exercised only after giving notice by advertisement for a certain time in some newspaper, or after giving some other prescribed notice. In several states the notice to be given is prescribed by statute, and in such case the statute must be followed whatever may be the provisions of the power in this respect. In either case a sale made without the proper prescribed notice is invalid, but ordinarily the courts will not interfere to restrain a sale about to be made without such notice. The purchaser is bound to know what the requirements of the deed or of the statute are in this respect, and to see that they have been complied with;[5] and the mortgagor and others interested in the equity may redeem all the same if the power is illegally exercised. Even under the English

[1] Jackson *v.* Dominick, 14 Johns. (N. Y.) 435.

[2] Armstrong *v.* Sanford, 7 Minn. 49. The rule is different in Iowa, where apparently an injunction would be granted upon a tender of the amount justly due. Stringham *v.* Brown, 7 Iowa, 33; Sloan *v.* Coolbaugh, 10 Iowa, 31.

[3] Kornegay *v.* Spicer, 76 N. C. 95.

[4] Bidwell *v.* Whitney, 4 Minn. 76; Culbertson *v.* Lennon, 4 Minn. 51; Banker *v.* Brent, 4 Minn. 521.

[5] Anon. Mad. & Gel. 10. A provision in the power, that the purchaser shall not be bound to inquire into the existence of notice, does not protect him against his actual knowledge that there was no notice. Parkinson *v.* Hanbury, 1 Dr. & Sm. 143; 2 De G., J. & S. 450. See, also, Ford *v.* Heely, 3 Jur. N. S. 1116; Forster *v.* Hoggart, 15 Q. B. 155.

statute, which provides that the purchaser shall not be affected by the absence of such notice, and that the mortgagor may have remedy by an action for damages, or under a power with like provisions, the Court of Chancery has no jurisdiction to restrain a sale of which no notice has been given.[1]

1811. Not enjoined to allow set-off. — Neither will a sale under a power be enjoined, in order that the mortgagor may be enabled to set off a balance which may be found in his favor upon unliquidated claims in controversy between him and the mortgagee;[2] nor to enable the mortgagor to prosecute a bill to correct an alleged error in the amount of the mortgage.[3]

1812. Time for contribution to redeem. — It is no ground for suspending a sale that the several owners of the equity of redemption are at variance as to the proportions which they shall contribute for the redemption of the mortgage; though the court may, upon payment into court of a sum sufficient to indemnify the mortgagee against loss, grant a reasonable postponement.[4]

1813. When amount of debt is in dispute. — In an early case in New York a sale was enjoined on an application in behalf of an infant heir of the mortgagor, the amount due upon the mortgage being in dispute.[5] The court, however, did not seem to consider that the case afforded any equitable ground for interference, further than to subject the sale to some restrictions: and perhaps make these restrictions only because the defendant consented to them. These were that the amount due should be computed by a master, who should be associated with the mortgagee in making the sale; and that a further notice of the sale should be given, and that only so much of the land should be sold as the master should deem sufficient, in case a part could be sold without prejudice. In another case in that state a sale was enjoined when the mortgagee claimed in his notice a larger amount than was actually due.[6] Whether these would be grounds for enjoining a sale, where there is no statute providing that only so much of the property shall be sold as is sufficient to satisfy the debt, may well be doubted. When the accounts between the parties are complicated,

[1] Prichard *v.* Wilson, 10 Jur. N. S. 330.

[2] Frieze *v.* Chapin, 2 R. I. 429; and see Robertson *v.* Hogsheads, 3 Leigh (Va.), 667; Koger *v.* Kane, 5 Ib. 606.

[3] Outtrin *v.* Graves, 1 Barb. (N. Y.) Ch. 49.

[4] Brinckerhoff *v.* Lansing, 4 Johns. (N. Y.) Ch. 65.

[5] Van Bergen *v.* Demarest, 4 Johns. (N. Y.) Ch. 37. See § 1775.

[6] Cole *v.* Savage, Clarke (N. Y.), 361.

and the balance due under the mortgage is uncertain, a sale may sometimes be enjoined, until the equities between the parties which should affect the amount due under the mortgage are settled, and the balance due can be ascertained.[1]

1814. Where one purchased land subject to a mortgage which he supposed was in the common form, without a power of sale, and would require three years' possession by the mortgagee to effect a foreclosure, the mortgage having been made the same day and not recorded, a sale under the power was enjoined upon his application. He was allowed, however, only time to raise the money, and not the three years in which to redeem.[2] It is conceived that in those parts of the country in which power of sale mortgages are now the usual and common form, an injunction would not now be granted on like grounds.

1815. Clouding title. — The fact that the sale if made would, in the apprehension of the petitioner, result in clouding his title, is not such a threatened injury that an injunction should be granted to restrain it.[3] If the mortgagee should attempt to sell property not included in the mortgage, or an interest greater than the mortgage conveyed to him, the sale would be of no effect as regards such property or interest, and would not really cloud the title to it.[4]

1816. The insolvency of the trustee in a deed of trust is no ground for restraining a sale of the property upon the application of the grantor, unless it is shown that there is danger that the trustee will misapply the moneys arising from the sale.[5]

1817. Scarcity of money or business depression. — The fact that at the time of the proposed sale under a mortgage or trust deed money is scarce, and that the terms of sale require a large cash payment, is no ground for an injunction;[6] nor is the fact that there is a general depression in business, and the weather inclement at the season of the year of the proposed sale.[7]

[1] Kornegay *v.* Spicer, 76 N. C. 95; Capehart *v.* Biggs, 77 N. C. 261; Purnell *v.* Vaughan, 77 N. C. 268.

[2] Platt *v.* McClure, 3 Wood. & M. 151.

[3] Armstrong *v* Sanford, 7 Minn. 49, per Atwater, J.; Montgomery *v.* McEwen, 9 Minn. 103; but see Hubbard *v.* Jasinski, 46 Ill. 160.

[4] Armstrong *v.* Sanford, *supra.*

[5] Tooke *v.* Newman, 75 Illinois, 215. Walker, C. J.: "Insolvency, or the want of large capital, by no means implies a want of integrity or business capacity. He may have these in the highest degree, and yet be poor."

[6] Muller *v.* Bayly, 21 Gratt. (Va.) 521.

[7] Caperton *v.* Landcraft, 3 W. Va. 540.

1818. A referee or master may be associated with the mortgagee for the purpose of insuring a fair sale, or a sale of only enough of the premises to satisfy the mortgage debt; instead of enjoining a sale, where there is apprehension of an oppressive or improper exercise of it.[1]

1819. Recovery back of money paid under duress. — Besides these remedies, by restraining or setting aside a sale improperly exercised, in case a mortgagor is obliged to pay a sum not properly chargeable to him, in order to prevent the sale of his property under the power, he may recover back the money so paid in a suit at law; as, for instance, where a mortgagee would not stop a sale unless the mortgagor would pay an extortionate sum for expenses then incurred in the proceedings to sell, and the mortgagor paid the amount under protest.[2]

1820. Mortgagee's damages and costs when wrongfully enjoined. — When wrongfully enjoined the mortgagee is not only entitled to the usual taxable costs and counsel fees, but also, when the sale does not yield enough to satisfy the debt, to interest on it while the collection of it was suspended, and to the value of the emblements removed by the owner in the mean time.[3]

6. *Personal Notice of Sale.*

1821. No notice at all is necessary unless made so by statute, or by the power itself;[4] the sale may be private.[5] When that provides only for a published notice, this is all that any one interested in the property is entitled to, unless there be an agreement for an express notice.[6] In no case is an actual personal notice of the sale to the mortgagor necessary unless this is provided for in the mortgage, or has been promised in some other way.[7] When the power authorizes a sale, either by public auc-

[1] Van Bergen *v.* Demarest, 4 Johns. (N. Y.) Ch. 37.

[2] Close *v.* Phipps, 7 M. & G. 586. Tindal, C. J.: "The money was obtained by what the law would call *duress;* as the plaintiff was obliged either to pay it or to suffer her estate to be sold, and incur the expense and risk of a bill in equity." And see Vechte *v.* Brownell, 8 Paige (N. Y.), 212.

[3] Aldrich *v.* Reynolds, 1 Barb. (N. Y.) Ch. 613.

[4] Davey *v.* Durrant, 1 De G. & J. 535. The power in this case authorized a sale either by public sale or private contract.

[5] Mowry *v.* Sanborn, 68 N. Y. 153, 160, per Andrews, J.; Martin *v.* Paxson, 66 Mo. 260, 266, per Hough, J.

[6] Dyer *v.* Shurtleff, 112 Mass. 165; Hurt *v.* Kelly, 43 Mo. 238.

[7] Princeton Loan & Trust Co. *v.* Munson, 60 Ill. 371. "The debtor himself here prescribed the kind of notice which should be given in case of sale: it was not

tion or private contract, the mortgagee may sell by private contract, without making a previous attempt to sell by auction.[1]

1822. All the essential requisites of the power must be strictly complied with;[2] and when there are statutory provisions relating to the notice of the sale, or the conduct of it, these must be strictly followed. These requirements of the power and of the statute are conditions on which the foreclosure depends, and if not fulfilled the sale is void.[3]

Under a statute or power requiring the service of notice upon the mortgagor and others interested in the equity of redemption, a sale without such notice does not bar the right of redemption of a person entitled to it, even though he had actual notice of the sale. He is entitled to the legal notice.[4]

1823. When the notice required is a personal notice to the mortgagor or his assigns, if fairly given pursuant to the power, it does not matter that the person upon whom it is served is an infant, or is insane, or under any other disability.[5]

1824. A mortgagor cannot waive notice for others. If those claiming under the mortgagor are entitled to notice, he cannot waive it as against them and consent to a sale.[6]

1825. If a mortgagee voluntarily promises the mortgagor not to sell under the power without notice to him, there being no consideration for the promise, it is not legally binding upon him, and he may sell under the power, or assign the mortgage to others who may sell without giving notice, and such assignees are not

personal notice but notice by advertisement in a newspaper. To say that a further personal notice was required by implication would be to annex a condition to the power of sale which the maker of the power did not see fit to provide, and the court would be making a contract for the parties instead of enforcing the one made by themselves." Per Mr. Justice Sheldon.

In Capehart *v.* Riggs, 77 N. C. 261, Pearson, C. J., says that the mortgagee before selling ought to give the mortgagor reasonable notice that in default of payment he will sell, and that the want of such notice is ground for enjoining the sale. But this is all wrong. It is taking the parties under guardianship; and more, it is making a contract for them.

[1] Davey *v.* Durrant, 1 De G. & J. 535.

[2] Ormsby *v.* Tarascon, 3 Litt. (Ky.) 404; Dana *v.* Farrington, 4 Minn. 433; Gibson *v.* Jones, 5 Leigh (Va.), 370.

[3] Low *v.* Purdy, 2 Lans. (N. Y.) 422; Cole *v.* Moffitt, 20 Barb. (N. Y.) 18; Cohoes Co. *v.* Goss, 13 Barb. (N. Y.) 137; King *v.* Duntz, 11 Barb. (N. Y.) 191; St. John *v.* Bumpstead, 17 Barb. (N. Y.) 100; Van Slyke *v.* Shelden, 9 Barb. (N. Y.) 278.

[4] Root *v.* Wheeler, 12 Abb. (N. Y.) Pr. 294.

[5] Tracey *v.* Lawrence, 2 Drew. 403; Robertson *v.* Lockie, 15 Sim. 285.

[6] Forster *v.* Hoggart, 15 Q. B. 155.

liable to action for depriving the mortgagor of his equity of redemption, even if they obtained the assignment by fraud and falsehood.[1] The promise of the mortgagee would not bind his assignee who had no knowledge of it. But a sale by the person who made such promise, without giving the promised notice, would be set aside unless a *bonâ fide* purchaser had acquired title by receiving a deed before any proceedings to set the sale aside were begun. If a mortgagee has promised a junior mortgagee or any one claiming under the mortgagor that he will notify him if he should wish to enforce the mortgage, or that he will give him an account of his claim, his entry and foreclosure without such special notice is fraudulent, and the right to redeem remains open to such party until the stipulated notice is given or account rendered, the property remaining in the hands of the mortgagee who promised to give such notice.[2]

1826. Neglect to give notice may be ground for setting aside a sale. Where the owner of the equity of redemption gave money to the mortgagor to pay an instalment of interest, but the mortgagor did not pay it over to the mortgagee, and the owner being informed that the mortgagor had not paid the interest, sent word to the mortgagee's attorney that if the mortgagor did not pay the interest he would, and the mortgagee afterwards, without giving notice to the owner, sold the estate, although the mortgagee acted in good faith and in exact conformity to the provisions of the mortgage, and sold the estate to a purchaser who in good faith was the highest bidder at the sale, no deed having been delivered, the sale was set aside in equity on the ground that after it became evident that the mortgagor would not pay, notice should have been given to the owner.[3]

7. *Publication of Notice.*

1827. The notice usually required in powers of sale is a publication for a certain length of time in one or more newspapers published in the county in which the premises are situate. As will be seen by reference to the statutes relating to power of sale mortgages, the substance of the notice and the manner of giving

[1] Randall *v.* Hazelton, 12 Allen (Mass.), 412.

[2] Hull *v.* Cushman, 14 N. H. 171; Green *v.* Cross, 45 N. H. 574; Rutherford *v.* Williams, 42 Mo. 18; Clarkson *v.* Creely, 40 Mo. 114; S. C. 35 Mo. 95.

[3] Drinan *v.* Nichols, 115 Mass. 353.

it are prescribed in several states; and where this is the case the requirements of the statute must be strictly followed, whatever may be the terms of the power. The power may impose additional obligations, but cannot take away any of those imposed by statute; as, for instance, a private sale, though expressly authorized by the mortgage, would not bar the equity of redemption when a sale at public auction after giving specified notices is required by statute.[1] It has been held that a foreclosure according to the statutory requirement is valid, even when the power imposes additional requirements.[2] In the absence of statutory requirements, the kind of notice, the place where it shall be given, the time when it shall be given, and the duration or number of publications are properly subjects of contract between the parties, and their agreement is binding upon them.[3] The parties may agree that the notice shall be published in a county or state other than that in which the land is situated: or they may agree to dispense with notice altogether.

1828. Statutes regulating the foreclosure of mortgages have no application to mortgages of real estate situated out of the state where the statute was enacted.[4] The court cannot in such case interfere with or control a sale made within the state, according to such terms as the parties have agreed upon in the power, unless it appears that these terms are contrary to the statutes or law of the state or country where the land is situated, or that there is some illegality in the proceedings to sell. The parties to a mortgage have the power, in the absence of any statute regulation, to agree upon the manner in which the property may be sold to realize the security. Therefore, a sale after specified notices in the city of New York, of lands situate in Colorado, authorized by mortgage, cannot be restrained by the courts of New York as being in conflict with the statutes of that state. The only

[1] Lawrence *v.* Farmers' Loan & Trust Co. 13 N. Y. 642. A doubt has been expressed whether this decision should be extended to any requirement other than a sale at public auction; whether a compliance with the statute in any other respect is necessary; as, for instance, whether compliance with a provision in a power that the notice of sale shall be for a shorter time, and in a different manner, from that required by statute, would not be sufficient. Elliott *v.* Wood, 53 Barb. 285, 305; 45 N. Y. 71.

[2] Butterfield *v.* Farnham, 19 Minn. 85.

[3] Martin *v.* Paxson, 66 Mo. 260.

[4] Elliott *v.* Wood, 45 N. Y. 71; Central Gold Mining Co. *v.* Platt, 3 Daly (N. Y.), 263.

ground of interference would be that the sale provided for was in conflict with the laws of Colorado.[1]

1829. Fairness required. — In giving the notice the mortgagee is required to act in a business-like manner, with a view to obtain as large a price as he reasonably can with due diligence on his part, and in common fairness towards the mortgagor.[2] So far as the deed leaves any matters pertaining to the exercise of the power to the discretion of the mortgagee or trustee, a fair and honest exercise of his judgment is demanded.[3]

The provisions of the power and of any statute regulating the exercise of it must be strictly complied with;[4] but at the same time such strictness and literal compliance should not be exacted as would destroy the power and render the intended security valueless.[5] The proceedings may be regarded as *ex parte*, and the mortgagor may be divested of his estate without his knowledge and without his consent other than that contained in the mortgage itself. But under a statute providing for a certain notice of sale in case the parties fail to provide for a notice in the deed, it has been held that the notice prescribed by statute may be used in case the mode of notice agreed upon in the mortgage is impossible; as where this required an advertisement every other day in some newspaper published in the county, when there was no paper other than two weekly papers published in the county.[6]

1830. Burden of proof as to notice. — When the validity of a sale under a power is questioned by the debtor, on the ground that the advertisement of the sale was not made in pursuance of the deed, the burden of proving a proper advertisement rests upon the purchaser or other party insisting upon the sale.[7]

1831. A notice of sale published before any default has occurred in the condition of the mortgage is ineffectual and void, and a sale under it would be invalid. Equally ineffectual would be a publication after the time fixed for the sale. For these reasons it has been necessary to determine in some cases when a publication takes place. The time of publication and the date of the

[1] Carpenter *v.* Black Hawk Gold Min. Co. 65 N. Y. 43.

[2] Matthie *v.* Edwards, 2 Coll. 465; Hoffman *v.* Anthony, 6 R. I. 282.

[3] Ingle *v.* Culbertson, 43 Iowa, 265.

[4] Lee *v.* Mason, 10 Mich. 403; Doyle *v.* Howard, 16 Mich. 261; Sherwood *v.* Reade, 7 Hill (N. Y.), 431.

[5] Waller *v.* Arnold, 71 Ill. 350.

[6] Warehime *v.* Carroll Co. Build. Assoc. 44 Md. 512.

[7] Gibson *v.* Jones, 5 Leigh (Va.), 370.

paper are not always or necessarily the same; and in the case of newspapers published weekly, it is the general practice to issue a portion, at least, of the copies printed in advance of the date of the paper. In case of a newspaper dated Saturday, the whole edition of which, except a small fraction, is either delivered by carriers to subscribers, or deposited in the post-office on Friday, the publication is undoubtedly on Friday. When the proprietor of the paper sends the copies out or mails them, they pass beyond his control and the publication is complete. The fact that a small portion of the edition is not issued till Saturday is not material. It is not necessary that a notice should appear in every copy of the whole edition regularly printed and published in order to constitute a publication. In such case, therefore, if Friday be the last day for payment, the debtor would have the whole of the business hours of that day in which to make payment, and the publication would be in advance of the default, and would be ineffectual as the first publication of the notice.[1] If such a publication before default is one of the requisite number of publications prior to the time appointed for the sale, a subsequent postponement of the day of sale for a week does not cure the defect, even if the notice be again published, because neither the notice fixed for the day of sale in the first place, nor that for the adjourned day, is published for the requisite number of weeks before the sale.[2]

1832. **An assignment of the mortgage after the first advertisement** of the sale, and before the day of sale, invalidates the sale if the assignee continues the advertisement and sells under it, instead of advertising anew in his own name.[3] This is upon the ground that by the assignment the mortgagee ceased to have any interest in the mortgage; and that the power cannot be separated from the interest in the land, and exercised by one having no interest whatever in the mortgage. The assignment, moreover, vests the legal interest of the mortgage in the assignee, and the power necessarily passes with it unless expressly reserved. "An advertisement in the name of the mortgagee in this case can have no greater force or effect than if it had been made in the name of a third person, a stranger to all the parties in interest, which would be none at all."[4]

[1] Pratt *v.* Tinkcom, 21 Minn. 142.
[2] Tratt *v.* Tinkcom, *supra*.
[3] Niles *v.* Ransford, 1 Mich. 338.
[4] Ib., per Wing, J.

1833. Change of statute as to length of notice. — It is within the power of a legislature to change an existing law which requires the notice under a power of sale to be published for a certain length of time before the sale, by providing for a shorter time of publication, and such a law is not unconstitutional as applied to mortgages existing at the time of its passage.[1] It does not impair the obligation of the contract. It operates upon the remedy only, and it does not in such operation impair or take away the right of the mortgagee to enforce the obligation. The time of notice might be lengthened, and the remedy rendered less speedy and convenient without impairing the obligation. If there is still a substantial obligation left, that is sufficient.

1834. How long after publication sale may be. — In the absence of any express provision in regard to the time at which a sale shall be made after the publication of the notice, the sale must be within such a reasonable time after the last publication as not to thwart the purpose of the statute; but it need not be within the week following the last advertisement.[2] A provision that a sale may be made after a certain number of days' notice does not limit the sale to the day immediately succeeding the expiration of the time named.[3]

1835. Selection of newspaper. — The deed of trust or mortgage usually provides for the publication of notice of the sale in some newspaper published in the county or place where the property is situated. No particular newspaper being designated, the trustee or mortgagee may select any suitable medium for the publication at his discretion, observing the general requirement of the trust, that he act in fairness and in good faith.[4] It is not requisite that he should select the paper of the largest circulation, or of any particular class or character. A publication in a law and advertising journal of limited circulation has been held to be proper.[5] No proof of the notoriety or extent of the circulation of the paper in which the notice was published is required to sustain a sale under it.[6]

If the deed does not prescribe the place of publication, but leaves this to the discretion of the trustee, he may, in a fair exer-

[1] James *v.* Stull, 9 Barb. (N. Y.) 482.
[2] Atkinson *v.* Duffy, 16 Minn. 45.
[3] Beal *v.* Blair, 33 Iowa, 318.
[4] Ingle *v.* Culbertson, 43 Iowa, 265.
[5] Kellogg *v.* Carrico, 47 Mo. 157; Benkendorf *v.* Vincenz, 52 Mo. 441.
[6] St. Joseph Manufacturing Co. *v.* Daggett, 84 Ill. 556.

cise of his discretion, publish notice in a newspaper printed outside the limits of the state in which the land is situated.[1]

1836. Publication in two counties. — Where the deed provided that notice of sale should be given "by advertisement in some newspaper printed in St. Louis and Franklin County," and notice was given only in a newspaper printed in the latter county, the sale was declared void. The deed being recorded, the purchaser had notice of its requirements, and was bound by them.[2] A requirement in a deed of trust that sixty days' notice shall be given in newspapers published in Richmond, Virginia, and in the city of New York, must be fully complied with to effect a valid sale; and the fact that the mortgagee was in Virginia where the land was situated, and communication with New York prohibited on account of the pending war, is no excuse for failure to publish the notice as required.[3]

1837. Posting in public places. — A deed of trust required notice of sale to be posted in four public places in the county, and two of the notices were posted at different places in the same town. Objection was taken that the town was but one public place; but the court, without admitting that there was anything in the objection, held that it could only be availed of in equity, and not in an action at law.[4] Under a deed which provides for a sale on thirty days' notice by posting, if the notices have been put up that number of days before the sale, it is not necessary to the validity of the sale that the notices shall remain posted all the time up to the sale.[5]

A provision in a mortgage that the mortgagee might sell after having advertised the sale for sixty days in a newspaper published in a town named, "by posting up written or printed notices in four places in the county," was construed to mean that the notice might be given in either mode, the word *by* being evidently a mistake for *or*.[6]

1838. Length of time of publication. — A deed of trust required a publication of the notice of sale for five consecutive days, the last of which should be ten days before the sale. The last notice was on the eleventh day before that fixed for the sale.

[1] Ingle *v.* Jones, 43 Iowa, 286.

[2] Thornburg *v.* Jones, 36 Mo. 514.

[3] Bigler *v.* Waller, 14 Wall. 297.

[4] Rice *v.* Brown, 77 Ill. 549. In Graham *v.* Fitts, 53 Miss. 307, it was held that there was nothing in a kindred objection.

[5] Graham *v.* Fitts, 53 Miss. 307.

[6] Watson *v.* Sherman, 84 Ill. 263.

Upon a claim that the last insertion should have been on the tenth day before the sale, it was held that the last insertion might be more than ten days before the sale, but could not be made within a less time.[1] A longer notice, within a reasonable limit, does not injure but rather benefits the debtor.

A requirement in a deed of "thirty days' public" notice in a newspaper is satisfied by the publication of notice on each successive secular day in a newspaper not published on Sundays.[2] A requirement of publication "ten days before the sale" is fulfilled by publishing a notice of a sale to be had on the thirteenth day of a month, on the second day of that month, and each day thereafter, except Sunday, although there are only nine insertions of the notice.[3] It is a sufficient compliance with a requirement that ten days' notice of the sale shall be given, that the first insertion of the notice is made not less than ten days before the sale. It is not necessary that ten days shall intervene between the last insertion and the day of sale.[4] A requirement of "three weeks' previous notice" is met by a publication once a week for three weeks, and does not render necessary the publication of the notice daily for three weeks previous to the sale.[5] A sale authorized after "first giving thirty days' public notice" is properly advertised by the publication of a notice once a week for five weeks, the first publication being more than thirty days before the sale.[6] A requirement of notice in a newspaper "ten days before the day of sale" would be satisfied, it would seem, by a single publication ten days before the sale, — the language not importing a continuous publication.[7]

Where a power in a mortgage requires the notice of sale to be published "once each week for three successive weeks," the first publication need not be made three weeks before the time appointed for the sale.[8] And so in New York, where publication for twelve weeks successively, at least once a week, is required, the publications may be made in less than eighty-four days, provided there be a publication once in each week for twelve succes-

[1] Tooke *v.* Newman, 75 Ill. 215.

[2] Kellogg *v.* Carrico, 47 Mo. 157.

[3] Cushman *v.* Stone, 69 Ill. 516; Weld *v.* Rees, 48 Ill. 428; St. Joseph Manufacturing Co. *v.* Daggett, 84 Ill. 556.

[4] St. Joseph Manufacturing Co. *v.* Daggett, *supra*.

[5] Johnson *v.* Dorsey, 7 Gill (Md.), 269.

[6] Leffler *v.* Armstrong, 4 Iowa, 482.

[7] Weld *v.* Rees, 48 Ill. 428, 432.

[8] Dexter *v.* Shepard, 117 Mass. 480; Frothingham *v.* March, 1 Mass. 247.

sive weeks.[1] It would seem that the last advertisement may be on the morning of the day of sale.[2]

8. *What the Notice should contain.*

1839. **The advertisement of the sale should fully comply with the terms of the power**; and even a bare literal compliance is not enough. It must give with clearness all reasonable information about the proposed sale. It should appear upon the face of it that the sale is to be made by virtue of the power, or for the purpose of foreclosure.[3] It should show that a default has occurred within the terms of the mortgage;[4] but it need not point out for what particular breach of condition the sale is to be made.[5]

1840. **It must properly describe the premises** and the interest to be sold; and if the description, though including the lot to be sold, contains double the area of the lot mortgaged, the sale will be void.[6]

If the sale embraces the whole of the property mortgaged, the description should conform substantially to that contained in the mortgage. A notice which states nothing as to the quantity of land to be sold, and gives no metes or bounds and no information whether it is a village lot or a farm, is insufficient.[7] It is usual and proper, besides describing the premises by metes and bounds, to refer to the book and page of the record of the mortgage deed and to give the date of it; but if the premises are sufficiently described in other respects, an error in the reference to the record or to the date would not, it is conceived, invalidate the notice. Even where by statute these are required to be given, a notice referring correctly to the clerk's office where the mortgage is recorded, and to the date of the record, is held sufficient, although it mistakes the number of the book in which the record is made.[8]

A description of the property merely by reference to a plat or

[1] George *v.* Arthur, 2 Hun (N. Y.), 406; Howard *v.* Hatch, 29 Barb. (N. Y.) 297; and see, as to judicial sales, Wood *v.* Morehouse, 45 N. Y. 368; aff'g 1 Lans. 405; Olcott *v.* Robinson, 21 N. Y. 150; rev'g 20 Barb. 148.

[2] Worley *v.* Naylor, 6 Minn. 192. This decision was founded on a statute.

[3] Leet *v.* McMaster, 51 Barb. (N. Y.) 236; Judd *v.* O'Brien, 21 N. Y. 186, 190.

[4] Bush *v.* Sherman, 80 Ill. 160.

[5] King *v.* Bronson, 122 Mass. 122.

[6] Fenner *v.* Tucker, 6 R. I. 551; Hoffman *v.* Anthony, 6 R. I. 282.

[7] Rathbone *v.* Clarke, 9 Abb. (N. Y.) Pr. 66, note.

[8] Judd *v.* O'Brien, 21 N. Y. 186.

deed on record has been held sufficient;[1] though it is probable that such a description would not generally be held good. The description should be sufficient to apprise the mortgagor and others interested in the land that the land to be sold is that in which they have an interest; and sufficient to enable those who may wish to purchase to locate and identify the property, though a description by metes and bounds is not always necessary.[2] When a portion of the land described in the mortgage has been released from the operation of it, it is desirable that the portion remaining which is to be sold should be described by metes and bounds, with a reference to the mortgage and to the date and record of the release, rather than that the premises should be described in the same manner as they are described in the mortgage with such reference to the release made. When there have been many releases, so that the part to be sold would not be recognized at all by the description given in the mortgage, a description of the premises to be sold as they actually are is all the more desirable; and a reference to the releases, except generally, or as being the property not before released of record from the operation of the mortgage, is not important.

If the description of the premises follows that in the mortgage a change in the street number of the building since the mortgage was made does not invalidate the notice.[3]

1841. Notices of distinct lots should be separate. Several mortgages or deeds of trust having the same parties, and in every way alike except in the amounts secured, should be advertised separately, if they cover different lots of land;[4] if, however, the different mortgages are upon the same lot, there would seem to be no objection to publishing them together.

1842. Where the advertisement gave only a short and incomplete description of the property, and did not state the name of the mortgagee or of the assignee of the mortgage, and was signed only "per order of the assignee of said mortgage," and the place of sale was remote from the premises to be sold, and the

[1] Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64.

[2] Jackson *v.* Harris, 3 Cow. (N. Y.) 241.

[3] Model Lodging House Ass'n *v.* Boston, 114 Mass. 133.

[4] Marsh *v.* Morton, 75 Ill. 621. In this case notices under nine trust deeds upon different lots were published separately, and occupied about three columns of a daily paper. It was objected that the notices should have been consolidated into one, but the court allowed costs for the separate notices.

notice was ineffectual to attract purchasers, the sale was held invalid, and the mortgagor allowed to redeem.[1] "With such a notice," say the court, "and under such circumstances, a mortgagee, who is authorized to sell only at auction, finding himself to be the only bidder at the sale, cannot in good faith proceed with the sale and purchase the property for himself at his own price, and insist upon such a purchase as precluding the mortgagor from all right to redeem the property."

1843. The notice must show who orders the sale; and if it omits to identify the holder of the mortgage, and is signed by no one, although it states the names of the mortgagor and mortgagee, and refers to the book and page of the record of the mortgage, a sale under it will be invalid.[2] In Rhode Island, however, it has been held that an advertisement is sufficient although the mortgagee was not named in the notice, and that was signed only in the words "by order of the mortgagee."[3] But the same court held a notice to be fatally defective in which the reference to the record was not correctly made, and neither the name of the mortgagor nor of the mortgagee nor of the auctioneer was given, and the notice was not signed by any one.[4] Under a statute requiring that the notice shall specify the name of the mortgagee, it is sufficient that the notice is signed by him and contains an accurate reference to the record.[5] Upon the death of the mortgagee, in the absence of any bequest of the mortgage, the legal title vests in his executor or administrator; and a notice signed by the executor or administrator, with the word "executor" or "administrator" affixed, sufficiently discloses his interest and the source of his title.[6]

1844. The notice of sale need not name the owners of the equity of redemption, or the subsequent mortgagees, or others who have acquired an interest in the estate from the mortgagor since the mortgagee's title accrued.[7]

[1] Montague *v.* Dawes, 14 Allen (Mass.), 369.

[2] Roche *v.* Farnsworth, 106 Mass. 509.

[3] Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64.

[4] Hoffman *v.* Anthony, 6 R. I. 282.

[5] Candee *v.* Burke, 1 Hun (N. Y.), 546.

[6] Bridenbecker *v.* Prescott, 3 Hun (N. Y.), 419.

[7] Learned *v.* Foster, 117 Mass. 365; Dyer *v.* Shurtleff, 112 Mass. 165. In Roche *v.* Farnsworth, 106 Mass. 509, the omission to name those who had acquired interest in the property from the mortgagor was alluded to as one of the defects of the notice; but the decision does not rest upon that; the fatal defect there being the omission to name, either in the body of the notice or in the signature, the assignee of the mortgage who made the sale.

1845. It must specify definitely the time and place of sale.[1] A notice of a sale advertised to take place in February, 1858, though the sale was intended to be made, and was actually made, in 1859, was fatally defective.[2] If there be an established usage that such sales shall be at a particular place, as, for instance, the rotunda of the city hall, a notice of a sale to be made at the city hall would be sufficient.[3] Under the Minnesota statute for sale by advertisement, a notice of sale appointed for the 7th day of November, 1859, without naming any hour of sale, does not necessarily render the sale invalid. It is an irregularity which is not allowed to overthrow a sale, unless seasonable application be made, and certainly not after a lapse of twelve years after the time of sale.[4]

1846. If the power makes no provision as to the time, place, or terms of sale, or the manner of advertising it, and no statute regulates the proceedings, the mortgagee or trustee may exercise his discretion in these matters, and if fairly exercised the sale will be valid;[5] though it would be a safe and prudent course to pursue the mode ordinarily provided for in judicial sales;[6] and a court of equity would enforce the power according to its general practice. But if the mortgage provides that the mortgagee shall advertise the time, place, and terms of sale in a prescribed newspaper, this is in effect an authority to him to fix the time, place, and terms of sale at his discretion.[7] If the deed or mortgage provide that the sale shall be made on or near the premises, or at a particular place in a town or city named, a sale at any other place would not be in pursuance of the power, and would be invalid.[8] But if it merely provide that the sale shall be in a certain town or city, the trustee or mortgagee may cause it to be made at any usual or convenient place.

1847. Sale fixed for Sunday. — The proceedings to foreclose a mortgage are not void because the day specified in the advertisement happens on a Sunday. The court in a New York case thought that a sale on Sunday might not be prohibited by the

[1] Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35.

[2] Fenner *v.* Tucker, 6 R. I. 551.

[3] Hornby *v.* Cramer, 12 How. (N. Y.) Pr. 490.

[4] Menard *v.* Crowe, 20 Minn. 448; Butterfield *v.* Farnham, 19 Minn. 85.

[5] Olcott *v.* Bynum, 17 Wall. 44.

[6] Calloway *v.* People's Bank of Bellefontaine, 54 Ga. 441.

[7] Calloway *v.* People's Bank of Bellefontaine, *supra.*

[8] See Rice *v.* Brown, 77 Ill. 549.

statutes of that state; but in that case, the mistake being discovered before the day of sale, a postponement to the following day was made and advertised before the day fixed for the sale; and the sale on the following day was held to be regular.[1]

1848. Sale at ruins of court-house in Chicago. — Under a deed of trust made before the destruction of this court-house, providing that any sale under it should be had at the north door of the court-house, a sale after the destruction of the court-house may be made on the ground immediately in front of the place where the north door was at the time of the execution of the deed.[2] But such a provision in a mortgage made before the destruction of the court-house does not restrict the sale to the site of the court-house then in existence, but after its destruction the sale may be advertised and made at the north door of the building then in use as a court-house.[3]

After such a sale has been had, and a deed is given, in which it is recited that the sale was in due form, and according to the terms of the deed, it is held that a subsequent purchaser is not bound to look beyond the recitals of the deed.[4]

1849. Under a deed of trust providing that the sale shall take place at the "court-house door," a sale made at the door of a building temporarily used as a court-house, while repairs are making upon the court-house building, is a sufficient compliance with the terms of the deed.[5] Where a deed of trust, made after the destruction by fire of the court-house in Chicago, provided that the sale should be made "at the north door of the court-house in the city of Chicago," and the county courts were then held in a portion of a building formerly a court-house, but which had two north doors, an advertisement of a sale to be made at one of those doors was held to have been advertised to be made at the place designated in the deed.[6] A trust deed requiring the sale under it to be made at the court-house of the county is prop-

[1] Sayles *v.* Smith, 12 Wend. (N. Y.) 57; Westgate *v.* Handlin, 7 How. (N. Y.) Pr. 372.

[2] Chandler *v.* White, 84 Ill. 435; Waller *v.* Arnold, 71 Ill. 350.

[3] Alden *v.* Goldie, 82 Ill. 581; Wilhelm *v.* Schmidt, 84 Ill. 183.

[4] Long *v.* Rogers, 6 Biss. 416, per Blodgett, J.: "I am inclined to think that would be a good point if made at the time the sale took place. It would be good ground for stopping the sale before rights intervene; but I doubt if a purchaser would be absolutely obliged to take notice that the court-house was a ruin."

[5] Hambright *v.* Brockman, 59 Mo. 52.

[6] Gregory *v.* Clarke, 75 Ill. 485; Alden *v.* Goldie, 82 Ill. 581.

erly executed by a sale at the court-house of a newly organized county which includes the land sold.[1]

1850. Sale at city hall. — A notice of a sale to be made at the city hall in the city of New York was held to specify the place of sale with sufficient definiteness, inasmuch as by common usage the rotunda in the city hall proper is the established place for such sales.[2] It was said in this case, however, that except for such usage the notice would be too indefinite, as all the buildings used for holding courts within the Park are deemed in law the city hall. A notice which designates the place of sale as "at the court-house, in the city of St. Paul," is sufficient to uphold the sale, in the absence of any evidence of fraud or unfairness, or actual or probable injury.[3]

If the place of sale be left to the discretion of the trustee or mortgagee, he may make the sale at a place outside the state in which the mortgaged lands are situated; and if he acts with fairness and the parties interested in the property are not prejudiced thereby, the sale will be sustained.[4]

1851. If a mistake be made in the advertisement, such as would render a sale under it irregular or voidable, the mortgagee may waive the proceedings and advertise anew; or he may avail himself of his right to seek his remedy by foreclosure in a court of chancery.[5] Where the mistake was that the day of sale fell on Sunday, and the new notice fixing a different day for the sale claimed a different amount as due, it was held that there was nothing in the proceedings that enabled the mortgagor to avoid the sale.[6]

1852. Any error in the announcement of the sale which would naturally mislead the public, or deter persons from attending the sale and bidding, will render the sale irregular and void. Such would be the effect of an erroneous statement that the premises would be sold for default of three mortgages when in fact there were but two, the third being upon other land.[7]

A change in the time appointed for the sale after notice has once been given, if the mortgagor is thereby misled to his preju-

[1] Williams *v.* Pouns, 48 Tex. 141.

[2] Hornby *v.* Cramer, 12 How. (N. Y.) Pr. 490.

[3] Golcher *v.* Brisbin, 20 Minn. 453; Thorwarth *v.* Armstrong, 20 Minn. 464.

[4] Ingle *v.* Jones, 43 Iowa, 286.

[5] Atwater *v.* Kinman, Harr. (Mich.) 243.

[6] Banning *v.* Armstrong, 7 Minn. 46.

[7] Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35. See, also, Hubbell *v.* Sibley, 5 Lans. (N. Y.) 51; 50 N. Y. 468.

dice, avoids the sale, though the notice was published for the requisite length of time after the change.[1] When a sale is adjourned to a future day, but the notice of it as published is for a different day, the sale will be void.[2] Such also may be the effect of an advertisement of sale in which the day of the week and day of the month fixed for it are not coincident;[3] or one in which the sale was by mistake fixed for the wrong year.[4] But where the advertisement stated the day of the month correctly, but gave the wrong day of the week, and the mistake was corrected in the notice published the day before the sale, there being no evidence of any intention to mislead, a bill in equity to set aside the sale for irregularity was dismissed.[5]

Where a notice of sale under a deed of trust described three notes secured by it, one of them not being due, and recited that the trustee had been called upon to sell the property for the payment of two of them, there is no implication that the trustee intended to sell for the payment of all of the notes, and the notice is not open to objection.[6] A notice is not objectionable as misleading for the reason that it does not mention that all the notes have been paid but one, when it recites in general terms that default had been made.[7]

1853. Sale of equity of redemption. — A power of sale which authorizes the mortgagee to advertise and sell at auction the mortgaged premises, including all equity of redemption of the mortgagor, gives no authority to sell the equity of redemption alone; and if the advertisement states only that the equity of redemption will be sold, it is insufficient, and the sale under it is invalid. Any one wishing to purchase could only infer from the advertisement that he could buy an estate on which the incumbrance would continue.[8] But an advertisement by a second mortgagee of "all the right, title, interest, and estate which, by virtue of the power contained in said mortgage and the assignments thereof, I have the right to sell in and to" the mortgaged premises, is not defective, though the power was to sell the granted premises subject to a prior mortgage. The legal effect of the advertisement is the

[1] Dana *v.* Farrington, 4 Minn. 433.

[2] Miller *v.* Hull, 4 Den. (N. Y.) 104.

[3] Calloway *v.* People's Bank of Bellefontaine, 54 Ga. 441, 450.

[4] Fenner *v.* Tucker, 6 R. I. 551.

[5] Chandler *v.* Cook, 2 McArthur (D. C.), 176.

[6] Tooke *v.* Newman, 75 Ill. 215.

[7] Bush *v.* Sherman, 80 Ill. 160.

[8] Fowle *v.* Merrill, 10 Allen (Mass.), 350.

same as if the language of the mortgage had been used, and could mislead no one.[1]

1854. Unimportant omissions. — If the notice contains such facts as reasonably apprise the public of the time, place, and terms of sale, and describes the property sufficiently, mere omissions or inaccuracies not calculated to mislead any one are not to be regarded; as where a notice stated that the property would be sold for cash at the court-house door in the town of Hillsboro, without naming the county, or stating that the sale would be at public vendue to the highest bidder.[2]

It need not state the terms of sale, or that the terms would be stated at the time of sale; and if at the sale a deposit is required and this prevented a person present from bidding, if the mortgagee acted in good faith, and the requiring a deposit was usual and reasonable, this does not invalidate the sale.[3]

The advertisement need not be dated. The time of its first appearance by publication will be taken as the date.[4]

It is not necessary that the advertisement of a sale under a power should state that a default has occurred in the performance of the condition of the mortgage. The statement, that the sale is by virtue of the power given by the mortgage, necessarily implies that there has been a default.[5]

1855. A statutory requirement that the notice shall state the amount claimed to be due at the time of the first publication is sufficiently met by a statement of the amount claimed to be due at a certain prior date, and that the mortgagee claims that sum with interest from that time.[6] If only a part of the mortgage debt be due, it is the usual and safer way to state both the whole amount of the debt and the amount of it which has become payable.[7] The fact that the notice states a larger sum to be due than is actually due does not affect the validity of the sale,

[1] Model Lodging House Ass'n *v.* Boston, 114 Mass. 133.

[2] Powers *v.* Kueckoff, 41 Mo. 425. See, also, Gray *v.* Shaw, 14 Mo. 341; Beatie *v.* Butler, 21 Mo. 313; Hornby *v.* Cramer, 12 How. (N. Y.) Pr. 490.

[3] Model Lodging House Ass'n *v.* Boston, 114 Mass. 133; Goodale *v.* Wheeler, 11 N. H. 424; Pope *v.* Burrage, 115 Mass. 282; Wing *v.* Hayford, 124 Mass. 249.

[4] Ramsey *v.* Merriam, 6 Minn. 168.

[5] Model Lodging House Ass'n *v.* Boston, 114 Mass. 133; and see King *v.* Bronson, 122 Mass. 122.

[6] Judd *v.* O'Brien, 21 N. Y. 186, 189.

[7] Jencks *v.* Alexander, 11 Paige, 619, 626.

if no actual injury or fraudulent purpose is shown.[1] Although an excessive claim might have the effect to deter bidders, it cannot be inferred in the absence of proof that it actually had this effect. If the mortgagee should bid up to the amount of his excessive claim, and take the property, he would be obliged to pay the excess over what was legally due.[2]

1856. In advertising a sale under a second mortgage it is not essential to state the amount due upon the first mortgage, even if both mortgages are held by the same person. And if the mortgagee at the sale slightly overestimates the amount due on that mortgage, it is immaterial.[3]

9. *Sale in Parcels.*

1857. Generally there is no obligation to sell in parcels, except where such a sale is required by statute, or where special equities, which the mortgagee is bound to respect, have arisen as to portions of the premises. But even when the mortgagor has alienated a part of the mortgaged property, and upon equitable grounds the purchaser is entitled to have the part of the premises not alienated first sold under the power, he must apply to a court of chancery before the sale for an order directing the sale to be so made; and if he does not do this he cannot apply to have the sale set aside as against a *bonâ fide* purchaser.[4] There is generally no obligation upon him to sell in lots in order to obtain a greater price.[5] The deed generally empowers the mortgagee to sell the whole estate upon any default, and to pay the entire debt from the proceeds; and usually makes no provision in regard to the sale of the property in parcels. The mortgagee may nevertheless sell in parcels when the property will bring a better price by this mode of sale. After he has advertised the property to be sold in lots, the sale should be made accordingly. When the sale is made in parcels, it must stop when enough has been realized to

[1] Fairman *v.* Peck, 87 Ill. 156; Hamilton *v.* Lubukee, 51 Ill. 415; Jencks *v.* Alexander, 11 Paige (N. Y.), 619; Klock *v.* Cronkhite 1 Hill (N. Y.), 107.

[2] Butterfield *v.* Farnham, 19 Minn. 85; Bennett *v.* Healey, 6 Minn. 240; Bailey *v.* Merritt, 7 Minn. 159; Ramsey *v.* Merriam, 6 Minn. 168; Spencer *v.* Annon, 4 Minn. 542.

[3] Model Lodging House Ass'n *v.* Boston, 114 Mass. 153.

[4] St. Joseph Manufacturing Co. *v.* Daggett, 84 Ill. 556.

[5] Adams *v.* Scott, 7 W. R. 213. See, also, Grover *v.* Fox, 36 Mich. 461. As to sales in parcels under decree of court, see §§ **1616–1619.**

pay the debt and expenses; for the debt being paid the power of sale is exhausted.[1]

It is true, however, that some courts have adopted the rule that all forced sales of property shall be made in parcels, when the lots are sufficiently distinct both in law and in fact to render distinct sales practicable.[2] In such case, when the property is susceptible of division, a sale of the entire premises together will vitiate the sale, and a court of equity may set it aside.[3]

In some states it is provided by statute that when the mortgaged premises consist of distinct farms or lots they shall be sold separately, and that the sale shall cease when a sufficient sum has been realized to satisfy the debt.[4]

A party interested in the equity of redemption, who for a valuable consideration has waived his right to redeem, cannot object that the sale was not made in parcels, for the requirement is made in the interest of those entitled to redeem, and to protect this right in each parcel separately.[5] For the same reason the mortgagee cannot take this objection to his own proceedings.[6]

1858. Under a statute requiring a sale in parcels a mortgagee is not justified in selling the entire property in one lot, when any one interested in the equity of redemption requests a sale in parcels, and offers in good faith to bid the amount of the mortgage debt and expenses for a part of the property so situated that it may be conveniently sold separately.[7] But a mortgagee is not bound to sell in parcels without request where the division into parcels was not made until after the execution of the mortgage. The mortgagee is often in no situation to know of subsequent divisions of the property; and a sale, therefore, in

[1] Charter *v.* Stevens, 3 Den. (N. Y.) 33.

[2] Rowley *v.* Brown, 1 Binn. (Pa.) 61. This was a sale on execution. The court say: "It is the rule of this court to disallow in every case a lumping sale by the sheriff, where from the distinctness of the items of the property he can make distinct sales. It is essential to justice and to the protection of the unfortunate debtors that this should be the general rule. Any other would lead to the most shameful sacrifice of the property. There may be exceptions, but the purchaser must bring himself within them."

[3] Sumrall *v.* Chaffin, 48 Mo. 402; Chesley *v.* Chesley, 49 Mo. 540; 54 Mo. 347, and cases cited.

[4] **New York**: § 1751.
Wisconsin: § 1762.
Mississippi: § 1744.
Minnesota: § 1743.
Michigan: § 1741.
Dakota T.: § 1728.

[5] Clark *v.* Stilson, 36 Mich. 482.

[6] Clark *v.* Stilson, *supra.*

[7] Ellsworth *v.* Lockwood, 42 N. Y. 89. In this case, although the premises were described in the mortgage as one tract, the mortgage authorized a sale of "any part or parts" of it.

one entire parcel should be held to be good unless a request to divide it be shown.[1]

In some cases it has been said that if the premises at the time of the mortgage consisted of one tract, and were so described, the mortgagee is not bound to sell in parcels, although the land has subsequently been divided into lots,[2] and although he is requested by one interested in the equity to sell in lots according to a plan.[3] When the mortgage describes the land as one tract, it is said that it is the right of the mortgagee by the contract to sell the whole of the mortgaged premises in satisfaction of his debt; but the better opinion would seem to be that the obligation to sell in lots has reference to the situation of the property at the time of sale, irrespective of the description in the mortgage.[4]

The criterion in all cases is, what mode of sale will realize the largest amount of money? If this object can be obtained by the sale of the whole mortgaged premises together, that is the proper mode to pursue, even if they are readily divisible. If the land is divisible into separate parcels, and is better adapted for use in parcels, then the presumption would seem to be that it would produce a larger amount of money if sold in that way, and the sale should be made accordingly.[5]

1859. A trustee under a deed of trust is bound to render the sale as beneficial as possible to the debtor, and even in the absence of any provision in the deed for a sale of a part of the property, or for selling it in parcels if it be susceptible of division, and will bring more by sale in separate parcels, or if a sale of a part will satisfy the debt, he is bound to act accordingly;[6] and a sale not so made will be held invalid on application of the party injured.[7] The trustee must exercise a sound discretion in selling,

[1] Ellsworth *v.* Lockwood, 9 Hun (N. Y.), 548.

[2] Lamerson *v.* Marvin, 8 Barb. (N. Y.) 9.

[3] Griswold *v.* Fowler, 24 Barb. (N. Y.) 135. Although consisting of two tracts, if they have previously been held and used together as one farm, a sale of the whole in one parcel is good. Anderson *v.* Austin, 34 Barb. (N. Y.) 319.

[4] Ellsworth *v.* Lockwood, *supra.*

[5] Wells *v.* Wells, 47 Barb. (N. Y.) 416. See, also, American Ins. Co. *v.* Oakley, 9 Paige (N. Y), 259; Slater *v.* Maxwell, 6 Wall. 275.

[6] In Olcott *v.* Bynum, 17 Wall. 44, 62, where express authority was given to sell all the property upon the failure to pay any instalment of the debt secured at maturity, Mr. Justice Swayne said: "If enough of it to satisfy the amount due could be segregated and sold without injury to the residue, it would have been the duty of the mortgagees so to sell."

[7] Tatum *v.* Holliday, 59 Mo. 422; Goode *v.* Comfort, 39 Mo. 313; Gray *v.*

and must sell the land as a whole where it will sell for more in this way than in parcels;[1] and in parcels when it will sell better in this way. But a sale once made will not be set aside merely on the ground that the property was sold as a whole when it was capable of easy division. It must appear further that the interests of the debtor were sacrificed;[2] or that there was some attendant fraud or unfair dealing.[3]

The mortgage is usually so drawn that the whole debt becomes due upon any default;[4] but even when this is not the case, upon a default in the payment of an instalment of interest or of principal the whole mortgaged estate may be sold when a sale of a part would greatly impair the whole.[5]

A railway conveyed by a trust deed or mortgage to secure bonds may generally be sold altogether upon a default in the payment of interest, or of an instalment of the principal, before the maturity of the entire principal of the debt; because it would generally be the case that the line of road could not be divided and sold in pieces without manifest injury to the property. The fact that the road is situated in two or more states, and was originally owned by two corporations created in different states, does not affect the determination of this question.[6]

1860. Sale of sufficient only to pay the debt. — When a mortgage or trust deed authorizes the sale of the whole premises upon a default, a sale of the whole is regular, and as a rule no court will interfere with the exercise of the power in this way. Yet it has been held, where the policy of the laws of a state seemed to require that all forced sales of land should be confined to such portions of the premises as are sufficient to satisfy the debt, that a court of equity might interpose to prevent the full exercise of the power if the lands are divisible. But this is an inter-

Shaw, 14 Mo. 341; Taylor's Heirs *v.* Elliott, 32 Mo. 172, 175.

[1] Singleton *v.* Scott, 11 Iowa, 589; Kellogg *v.* Carrico, 47 Mo. 157; Carter *v.* Abshire, 48 Mo. 300.

[2] Chesley *v.* Chesley, 54 Mo. 347; Ingle *v.* Jones, 43 Iowa, 286; Shine *v.* Hill, 23 Iowa, 264; Fairman *v.* Peck, 87 Ill. 156.

[3] Benkendorf *v.* Vincenz, 52 Mo. 441; Ross *v.* Mead, 10 Ill. 171; Gillespie *v.* Smith, 29 Ill. 473.

[4] § 1181; Seaton *v.* Twyford, L. R. 11 Eq. Cas. 591.

[5] Olcott *v.* Bynum, 17 Wall. 44; Dunham *v.* Railway Co. 1 Ib. 254; Pope *v.* Durant, 26 Iowa, 233; Salmon *v.* Claggett, 3 Bland (Md.) Ch. 125.

[6] Wilmer *v.* Atlanta & Richmond Air Line R. R. Co. 2 Woods, 447.

ference with the contract of the parties which the courts will not make unless very strong reasons exist for so doing.[1]

Although the debt be payable in instalments and only one of them is due, a sale of the whole estate may be made. The power contemplates only one sale, and the statutes do not provide for a sale subject to future instalments.[2]

10. *Conduct of Sale, Terms, and Adjournment.*

1861. Mortgagee may act by attorney. — The entry upon the premises authorized by the power, the giving of the notice of sale, and the conduct of the sale, are acts which the mortgagee may perform through others, whose authority need not be under seal or in writing.[3] He may employ an auctioneer to make the sale, and his personal presence at the time and place of sale is not essential.[4] In general he may employ an agent or attorney to do any acts which are merely ministerial, and which involve no exercise of discretionary powers.[5] Of course he makes himself responsible for his agent's acts; and if he allows his agent to receive the proceeds of sale, and they are lost or misapplied, he cannot sue the mortgagor for the debt; or if he concurs with an assignee from the mortgagor of the equity of redemption in selling the property, and allows him to receive the purchase money, he may be perpetually restrained from suing the mortgagor for the debt.[6] It is not necessary that the mortgagee be personally present at the sale. This may be conducted by his attorney, whose acts he ratifies by subsequently making the deed necessary to convey the property.[7]

1862. But a trustee under a deed of trust should be personally present at the sale, so that he may, if necessary to prevent a sacrifice of the property, adjourn the sale, which it would be clearly his duty to do; therefore his absence at the sale has been held to render the sale void.[8] He is bound to adopt all rea-

[1] Johnson *v.* Williams, 4 Minn. 260.

[2] Barber *v.* Carey, 11 Barb. (N. Y.) 549; Bunce *v.* Reed, 16 Ib. 347; Cox *v.* Wheeler, 7 Paige (N. Y.), 248.

[3] Hoit *v.* Russell, 56 N. H. 559; Cranston *v.* Crane, 97 Mass. 459; Yourt *v.* Hopkins, 24 Ill. 326; Watson *v.* Sherman, 84 Ill. 263.

[4] Fogarty *v.* Sawyer, 23 Cal. 570.

[5] Hubbard *v.* Jarrell, 23 Md. 82

[6] Palmer *v.* Hendrie, 28 Beav. 341.

[7] Munn *v.* Burges, 70 Ill. 604; Parker *v.* Banks, 79 N. C. 480.

[8] Landrum *v.* Union Bank of Mo. 63 Mo. 48; Vail *v.* Jacobs, 62 Mo. 130; Graham *v.* King, 50 Mo. 22; Bales *v.* Perry, 51 Mo. 449.

sonable precautions to render the sale beneficial to the debtor; a bare compliance with the terms of the power is not enough. He must to this end exercise a reasonable judgment or discretion in respect to advertising the property and conducting the sale. In respect to all duties which are not merely mechanical or ministerial, and are not prescribed by the terms of the deed, a special trust and confidence are reposed in him, and he cannot delegate these to an agent.[1]

If the deed be to two trustees, either of whom is authorized to sell on default, and both join in giving notice and in executing the deed to the purchaser, the power is well executed, although but one attended the sale.[2]

1863. The power generally provides that the sale shall be by public auction, and in such case there can be no valid private sale. If the power allows of either mode, a private sale made in good faith and for a fair price is good, even without any advertisement.[3] If the authority be to sell by private contract, a sale at auction would not, it is conceived, be justified;[4] for the object in authorizing a private sale may be supposed to be the obtaining of a better price than would ordinarily be realized by an auction sale. If the power contains no restriction or provision as to the mode of sale, the mortgagee may sell at private sale as well as by public auction, though as a general rule a sale by auction would be the safer and better course. If the power makes provision for a sale by auction, prescribing the place of sale and the length of time the notice shall be advertised, this precludes the right to sell at private sale.[5]

1864. The terms of sale, while they should properly make it safe for the mortgagee, should not be so stringent as to deter persons from attending the sale and bidding. If the conditions are such as to have this effect the sale may be avoided. Not only must the mortgagee adhere strictly to the terms of the power, but in the trust relation in which he stands towards the persons interested in the equity of redemption he is bound to adopt proper means to get a reasonable price for the property.[6] There should

[1] Bales *v.* Perry, 51 Mo. 449.

[2] Weld *v.* Rees, 48 Ill. 428.

[3] Davey *v.* Durrant, 1 De G. & J. 535; Brouard *v.* Dumaresque, 3 Moo. P. C. 457; Montague *v.* Dawes, 12 Allen (Mass.), 397; Lawrence *v.* Farmers' Loan & Trust Co. 13 N. Y. 200; Elliott *v.* Wood, 45 N. Y. 71.

[4] See Daniel *v.* Adams, Amb. 495.

[5] Griffin *v.* Marine Co. of Chicago, 52 Ill. 130.

[6] Falkner *v.* Equitable Reversionary

be no special conditions for the advantage of any third person, such as might depreciate the property. Any condition that a prudent and reasonable owner would impose when selling in his own right is justifiable in a sale by the mortgagee under the power. The mortgagee may make reservations for the benefit of the owner of the equity of redemption, as, for instance, a reservation of a growing crop.[1]

1865. The acquiescence of the mortgagor in the conduct of the sale, and particularly in the terms of it, will cure any defect in this respect and give validity to it.[2] In *Mackey* v. *Langley* the mortgagor was present at the sale, and made no objection to the terms and conditions of it, and his acquiescence was held to conclude him from making objection afterwards. The case of *Taylor* v. *Chowning* is to the same effect.

1866. Payment at time of sale. — In fixing the terms of payment for a sale under a mortgage or trust deed, the mortgagee or trustee is bound to act fairly and with proper discretion. It is usual to require a deposit at the time of sale of a reasonable sum to cover the expenses of sale, and insure the completion of it by the purchaser. If the payment of the whole amount of the purchase money be arbitrarily required at the time of sale, or within an hour's time after it, against the remonstrances of persons in attendance at the sale, the sale will be set aside.[3] It must be shown, however, that this requirement had the effect of keeping persons present from bidding.[4] A requirement, not of the immediate payment of the entire purchase money, but of a deposit of a sum unusually large, and not proportioned to the value of the property, would have the same effect in invalidating the sale. It is not un-

Society, 4 Drew. 352; Matthie *v.* Edwards, 2 Coll. 465.

[1] Sherman *v.* Willett, 43 N. Y. 146.

[2] Taylor *v.* Chowning, 3 Leigh (Va.), 654; Markey *v.* Langley, 92 U. S. 142; Olcott *v.* Bynum, 17 Wall. 44, 64. In the latter case there had been a sale of land in North Carolina under a power in the year 1860. When the bill was filed to set it aside nearly eight years had elapsed. The mortgagor resided in New York, and the other parties in interest in North Carolina. Mr. Justice Swayne said: "Making allowance for the difficulty of intercourse between the North and the South during the war, there was acquiescence, express and implied, for three years after the war ceased. This, if not conclusive, weighs heavily against the complainant."

[3] Goldsmith *v.* Osborne, 1 Edw. (N. Y.) Ch. 560, 562. See Model Lodging House Ass'n *v.* Boston, 114 Mass. 133; Md. Perm. Land & Build. Soc. of Balt. *v.* Smith, 41 Md. 516. See § 1613.

[4] Goode *v.* Comfort, 39 Mo. 313, 326; Jones *v.* Moore, 42 Mo. 413.

reasonable to require the payment of $500 down upon a sale under a mortgage for $8,000, although the advertisement of the sale did not state that such a payment would be required, but did state that the terms of sale would be stated at the time of sale. At such a sale a person who had been requested by the mortgagor, who was present, to run up the estate for him, having bid it off and not having $500 with him to pay, and not asking any delay, the estate was put up again and sold for a less sum. It was held that there was no evidence in these circumstances of fraud or unfairness in the sale.[1]

In a case in Maryland, property worth at least $6,600 was purchased by the mortgagee for $1,600; and it further appeared that it had previously been struck off to another purchaser for the sum of $2,375, who tendered about half of this in cash, and stated that he would pay the balance on the ratification of the sale as required by the laws of that state, and offered sufficient security for this. The mortgagee declined to receive the money, as not in conformity with the terms of sale, which were for cash; and upon a subsequent offer of the property the mortgagee purchased it. The sale was set aside. Mr. Justice Stewart, delivering the opinion of the court, said the mortgagee had "misapprehended the nature of his duty as trustee, which required an advantageous sale of the property for the benefit of all the parties interested. . . . . There is this difference, however, between the trustee and the mortgagee, which should never be forgotten by the latter: that he has a personal interest in the proceeding, and that the mortgagor has, notwithstanding, reposed full trust and confidence in his strict impartiality, and that there must be ample reciprocity on his part by a fair and just discharge of his duty."[2]

1867. Time for examination of title. — Among other conditions of sale it is usual to provide that a certain time shall be allowed the purchaser for the examination of the title before the purchase money is payable. If unexpected difficulties occur in completing the examination of title, or in making the title satisfactory to the purchaser, much more time than that stipulated for may be necessary. In such cases time is not generally considered of the essence of the contract.[3]

1 Wing *v.* Hayford, 124 Mass. 244.

2 Horsey *v.* Hough, 38 Md. 130; cited with approval by Mr. Justice Swayne, in Markey *v.* Langley, 92 U. S. 142, 154.

3 Hobson *v.* Bell, 2 Beav. 17.

1868. Giving credit. — In general it may be said that where a power of sale does not expressly authorize the mortgagee to give credit, or to accept a mortgage in part payment of the purchase money under the sale to be made by him, a sale for cash is contemplated, and he would not be authorized to give credit for more than the amount of the debt due him, as the mortgagor or subsequent incumbrancers are entitled to receive the surplus remaining after the payment of the mortgage debt in cash. The persons entitled to the surplus could, of course, by subsequent agreement, waive this right and join the mortgagee in giving credit for the amount coming to them.

A purchaser at the sale is, of course, chargeable with notice of any requirement contained in the mortgage as to credit, and with notice of any irregularity attending the sale in this respect; but a remote purchaser is not chargeable with such notice.[1] If a requirement that the sale be for cash be substantially, though not literally, complied with, and no injury be done to the mortgagor, no objection can be taken to the sale.[2]

1869. When the power does not prescribe the terms of sale, the sale may properly be for cash, even where it is customary to give credit on foreclosure sales.[3] In Maryland, where sales under powers must be reported to the court and confirmed to make them valid, an objection to a sale for cash as harsh and inequitable can be taken only upon the ratification of the sale, and is no ground for enjoining it.[4]

1870. If the mortgagee may sell for cash or credit he must use his discretion fairly. When by the terms of the power he is authorized to use his discretion in this respect, he must use it fairly in the interest of the mortgagor, and not merely for his own interest; and if the property is subject also to other liens, the mortgagee in selling under his power is a trustee for them, as well as for the mortgagor. Whether he shall sell for cash or for credit or for both, when expressly authorized to do either, is a matter for his discretion, to be fairly exercised for the benefit of all concerned. "He must regard the interest of others as well as his own. He should seek to promote the common welfare. If he does this, and keeps within the scope of his authority, a court of equity will in nowise hold him responsible for mere errors of judg-

[1] Johnson *v.* Watson, 87 Ill. 535.
[2] Ballinger *v.* Bourland, 87 Ill. 513.
[3] Olcott *v.* Bynum, 17 Wall. 44.
[4] Powell *v.* Hopkins, 38 Md. 1.

ment, if they have occurred, or for results, however unfortunate, which he could not have anticipated." [1]

1871. The mortgagee may, in making the sale, take all the risk of the credit or for the purchase money upon himself; and charge himself with the whole proceeds, and then pay the surplus in cash to the owner of the equity of redemption, or others entitled to it. With this limitation, neither the mortgagor nor other parties interested in the property can object to the giving of credit, for this affords an opportunity to make a better sale, and is for the benefit of all parties.[2] Although the deed itself provides that the sale shall be made for cash, the mortgagee may give credit for that part of the proceeds coming to him; [3] and where the premises have subsequently become incumbered by other liens, the holders of which are satisfied to take the notes of the purchaser at the foreclosure sale, the mortgagee making the sale may take such notes in part payment, as they are equivalent to cash, and the taking of them does not prejudice any one.[4] On the contrary, such a course would generally result to the advantage of the owner and of the holders of subsequent liens.[5]

A power of sale given to a mortgagee authorized him, in case of a default in payment of the principal sum and interest, to dispose of the premises by public sale or private contract for such price as could reasonably be obtained for them. Upon default the mortgagee made a private contract of sale. Subsequently, the purchaser not finding it convenient to pay the money down, it was agreed that the larger portion of the purchase money should remain on the mortgage of the estate; and then, instead of conveying the estate to the buyer, the mortgagee conveyed to a trustee, to hold in the first place as security for the payment of the purchase money. It was contended that this was not a good exercise of the power, because the purchase money was not paid down. The amount received was less than the debt due the mortgagee. The court held that the power was duly exercised, and that it was

[1] Markey *v.* Langley, 92 U. S. 142, per Mr. Justice Swayne.

[2] Bailey *v.* Ætna Ins. Co. 10 Allen (Mass.), 286; Davey *v.* Durrant, 1 De G. & J. 535; and see Thurlow *v.* Mackeson, L. R. 4 Q. B. 97; Crenshaw *v.* Seigfried, 24 Gratt. (Va.) 272; Cox *v.* Wheeler, 7 Paige (N. Y.), 248; Parker *v.* Banks, 79 N. C. 480.

[3] Strother *v.* Law, 54 Ill. 413.

[4] Mead *v.* McLaughlin, 42 Mo. 198.

[5] Cox *v.* Wheeler, 7 Paige (N. Y.), 248, 251.

immaterial that the contract of purchase was carried out by a mortgage.[1]

1872. When the mortgagee is expressly authorized to sell for cash or on credit, he may do either or combine both in the sale, and although the terms of sale provide for the payment of one third of the purchase money in cash, and the balance in notes secured by mortgage upon the same property, it is competent for the mortgagee to change the terms after the property is struck off, by giving credit for a larger portion of the purchase money. Such a power is in this respect without restriction.[2]

In *Markey* v. *Langley*, the mortgagee, being authorized to sell for cash or for credit, sold wholly upon credit, and took property in addition to that covered by the original mortgage as security. On account of a great depreciation in value afterwards, the mortgagee was obliged to sell the property again, and for a less price; and a subsequent incumbrancer then claimed that the mortgagee should be charged with a portion of the nominal proceeds of the first sale as cash, on the ground that he was not justified in selling for credit wholly. But the court held that having authority to sell in this way, and having acted at the time in good faith and for the benefit of all concerned, so far as then appeared, he could not be held responsible for the results.[3]

When a sale is properly made in part for credit, interest continues to run on the part of the mortgage debt not satisfied by the cash payments, until the purchase money is received.[4]

1873. Adjournment. — The power to a trustee or mortgagee to sell by public auction, after a certain public notice of the time and place of sale, includes the power to adjourn the sale, in the exercise of a sound discretion, in order to obtain a fair price for the property. He may adjourn it more than once.[5] Without such power the property might be sacrificed to the injury not only of the creditor but of the debtor as well. As has already been seen, this power of adjournment is held to belong to sheriffs and other public officers selling under judgment or decree of court.[6] "If such a power," says Mr. Justice Curtis, "is implied where the

[1] Thurlow *v.* Mackeson, L. R. 4 Q. B. 97.

[2] Markey *v.* Langley, 92 U. S. 142.

[3] Markey *v.* Langley, 92 U. S. 142.

[4] Stanford *v.* Andrews, 12 Heisk. (Tenn.) 664.

[5] Richards *v.* Holmes, 18 How. 143.

[6] See chapter xxxvi; Warren *v.* Leland, 9 Mass. 265; Russell *v.* Richards, 11 Me. 371; Tinkom *v.* Purdy, 5 Johns. (N. Y.) 345.

law, acting *in invitum*, selects the officer, *a fortiori* it may be presumed to be granted to a trustee selected by the parties."[1]

It is well settled that a mortgagee may, in the exercise of a reasonable discretion, adjourn the sale from time to time.[2] It is his duty, growing out of the trust relation he occupies towards the mortgagor and all parties interested under him, to get the best price he can, and to take proper and reasonable means to obtain the full value of the property. If he deems it expedient to adjourn the sale for the reason that very few persons are present, he has the right to do so. He must act in good faith. It often becomes in this way the duty of the mortgagee, or of a trustee under a deed of trust, to adjourn the sale.[3] The want of bidders renders an adjournment necessary.

A sale at which no one is present but the auctioneer, who bids off the property for the mortgagee, is void. It is not a legal auction.[4] If the purchaser to whom the property is struck off at the auction refuses to complete his purchase, and the hour of sale has passed and the bidders have departed, a resale cannot be made without advertising the property anew.[5]

When an adjournment is made, it is usual for the officer to announce to those in attendance at the sale the time and place to which the sale is adjourned. The time announced in this way and that afterwards published should agree, or the validity of the sale may be affected.[6]

1874. **The notice of an adjournment** of a sale, if given at all, need not be so minute and specific as the original advertisement.[7] The adjourned sale is in effect the sale of which the previous notice was published. If the notice of the adjourned sale by mistake fixes a different and more distant day for the sale than that to which the adjournment was actually made, and the sale is actually made upon the day specified in such notice, it will be irregular and void.[8] Whether publication of the adjournment is necessary depends upon the circumstances of the case, and particularly

[1] Richards *v.* Holmes, 18 How. 143.

[2] Richards *v.* Holmes, *supra;* Dexter *v.* Shepard, 117 Mass. 480; Hosmer *v.* Sargent, 8 Allen (Mass.), 97.

[3] Vail *v.* Jacobs, 62 Mo. 130, 133; Johnston *v.* Eason, 3 Ired. Eq. 336.

[4] Campbell *v.* Swan, 48 Barb. (N. Y.) 109.

[5] Barnard *v.* Duncan, 38 Mo. 170; Dover *v.* Kennerly, 38 Mo. 469.

[6] Miller *v.* Hull, 4 Den. (N. Y.) 104; Jackson *v.* Clark, 7 Johns. (N. Y.) 217.

[7] Dexter *v.* Shepard, 117 Mass. 480.

[8] Miller *v.* Hull, 4 Den. (N. Y.) 104.

upon the length of time for which the adjournment is made. But it would seem that the omission to advertise the adjournment, in any case of an adjournment for a reasonable time, would not avoid the sale.[1]

The adjournment should be announced at the time and place appointed for the sale; and the time and place of the adjourned sale should be stated. It may be made without the agency of a licensed auctioneer.

In Illinois it is held that a trustee in a deed of trust may adjourn the sale in his discretion; but when he does so, he must give a new notice for the same length of time required in the first instance.[2] In some states it is provided by statute that notice of the adjournment shall be given in the same paper in which the original notice was published, and by posting also.[3]

But generally a sale under a power may be adjourned to a future day without giving a new notice for the length of time required for the first notice.[4] After a postponement of a sale has been publicly announced, the mortgagee cannot disregard it, and proceed to sell at the time fixed in the original notice. This would enable the mortgagee to mislead the mortgagor, and would confuse persons wishing to purchase as to the time of sale.[5]

1875. There is no obligation to delay sale to more favorable time. If a mortgagee sells openly and fairly, and in compliance with the terms of the power, it cannot be objected that he might have obtained a greater price by waiting until a more favorable time. No such obligation is imposed by the mortgage.[6] In a case before the Court of Appeal in Chancery, in relation to a sale by private contract, Lord Justice Knight Bruce said: "It may be that, by speculating and waiting a long time, a larger sum would

[1] Hosmer *v.* Sargent, 8 Allen (Mass.), 97; Stearns *v.* Welsh, 7 Hun (N. Y.), 676; Allen *v.* Cole, 9 N. J. Eq. 286; Coxe *v.* Halsted, 2 Ib. 311. The last three cases relate to foreclosure sales in equity. Hosmer *v.* Sargent, 8 Allen (Mass.), 97.

[2] Griffin *v.* Marine Co. of Chicago, 52 Ill. 130; Thornton *v.* Boyden, 31 Ill. 200.

[3] See Statutory Provisions for **Michigan**: § 1741.
Minnesota: § 1743.
New York: § 1751.
Wisconsin: § 1762.

[4] Jackson *v.* Clark, 7 Johns. (N. Y.) 217; Dana *v.* Farrington, 4 Minn. 433; Bennett *v.* Brundage, 8 Minn. 432; Sayles *v.* Smith, 12 Wend. (N. Y.) 57; Westgate *v.* Handlin, 7 How. (N. Y.) Pr. 372.

[5] Jackson *v.* Clark, *supra*. The postponement was published under the original notice as follows: "Note, the sale of the above property is postponed to Wednesday, the 3d day of September next."

[6] Franklin *v.* Greene, 2 Allen (Mass.), 519.

thereafter have been obtainable, had the sale not taken place as it did. But Mr. Durrant (the mortgagee) was not bound to speculate or wait, and was justified in accepting Mr. Packe's price, which was, I repeat, in my opinion, a reasonable and fair price." [1]

11. *Who may purchase at Sale under Power.*

1876. Mortgagee not allowed to purchase. — The mortgagee being regarded as in some respects a trustee of the property mortgaged, as a rule, cannot himself become a purchaser at the sale either directly or indirectly through another person, unless this right be given him by the terms of the power.[2] He is bound to exercise entire good faith; and if without express authority given him so to do he becomes the purchaser at the sale, he is subject to the rule which applies generally to a trustee and prohibits his purchasing the trust property.[3]

If the mortgagee, when not authorized, purchases at the sale, the mortgagor or any other person interested under him may disaffirm the sale, provided he acts within a reasonable time.[4] Such a sale is voidable only, and cannot be treated in a suit at law as absolutely void, unless actual fraud be shown; [5] and, being good till it is set aside, will support an action of ejectment.[6] A beneficiary under the trust, or a mortgagee who becomes a purchaser, is regarded only as a mortgagee in possession in consequence of the sale and conveyance; but is entitled to be treated as the owner of the property until it is redeemed.[7] If the mortgagor does not claim his right to avoid such a sale, the mortgagee may

[1] Davey *v.* Durrant, 1 De G. & J. 535.

[2] Downes *v.* Grazebrook, 3 Mer. 200; *In re* Bloye's Trust, 1 Mac. & G. 488; Lockett *v.* Hill, 1 Woods, 552; Griffin *v.* Marine Co. 52 Ill. 130; Waite *v.* Dennison, 51 Ill. 319; Phares *v.* Barbour, 49 Ill. 370; Roberts *v.* Fleming, 53 Ill. 196; Ross *v.* Demoss, 45 Ill. 448; Hall *v.* Towne, 45 Ill. 493; Watson *v.* Sherman, 84 Ill. 263.

[3] Michoud *v.* Girod, 4 How. 503; Parmenter *v.* Walker, 9 R. I. 225; Korns *v.* Shaffer, 27 Md. 83; Howard *v.* Ames, 3 Met. (Mass.) 308; Hyndman *v.* Hyndman, 19 Vt. 9; Benham *v.* Rowe, 2 Cal. 387; Rutherford *v.* Williams, 42 Mo. 18; Whitehead *v.* Hellen, 76 N. C. 99; Kornegay *v.* Spicer, 76 N. C. 95.

[4] Munn *v.* Burges, 70 Ill. 604; Farrar *v.* Payne, 73 Ill. 82; Johnson *v.* Watson, 87 Ill. 535; Thornton *v.* Irwin, 43 Mo. 153; Allen *v.* Ranson, 44 Mo. 263; McLean *v.* Presley, 56 Ala. 211; Joyner *v.* Farmer, 78 N. C. 196.

[5] Patten *v.* Pearson, 57 Me. 428; Burns *v.* Thayer, 115 Mass. 89; Mulvey *v.* Gibbons, 87 Ill. 367.

[6] Hawkins *v.* Hudson, 45 Ala. 482. See Whitehead *v.* Hellen, 76 N. C. 99, a wrong decision.

[7] Goldsmith *v.* Osborne, 1 Edw. (N. Y.) Ch. 562; Rutherford *v.* Williams, 42 Mo. 18.

himself come into equity, to have the uncertainty of his title removed by a confirmation of the sale, or by a resale under order of court.[1]

Where the notes have been transferred by the payee to a firm of which he is a member, all the members of the firm are equally prohibited from purchasing at the sale.[2] But a mortgagee may purchase an outstanding title, or the equity of redemption, either from the mortgagor, or from his grantee, and hold the title absolutely in his own right. He may purchase under a judgment of prior date to the mortgage.[3] But if the purchase be aided by the mortgagor, or he be fraudulently prevented by the mortgagee from purchasing himself, and the mortgagee has taken advantage of his position, he will hold the title acquired for the benefit of the mortgagor as his trustee.[4]

The mortgagee may also purchase from the mortgagor, unless the mortgagee uses his position to obtain the equity of redemption at an inadequate price.[5] As "between mortgagee and mortgagor there is nothing analogous to a trust until the whole mortgage debt has been paid and satisfied; from which moment, and not until then, the mortgagee becomes a trustee for the mortgagor."[6]

When a third person has in good faith purchased at the mortgage sale, the mortgagee may purchase of him. His trust is ended with the sale.[7] But if there was a previous arrangement between him and the purchaser for a reconveyance the trust may still attach to him, and the title he has acquired will be voidable.[8] The presumption is in favor of the mortgagee that he has fulfilled his trust until the contrary is shown.

1877. It is not necessary in order to avoid the sale to show that there was any actual fraud or unfairness in the transaction, when a mortgagee has violated the principle that a trustee can never be a purchaser. There might be fraud or unfairness, and yet this could not be proved. To guard against this uncertainty,

[1] McLean *v.* Purley, 56 Ala. 211.

[2] Mapps *v.* Sharpe, 32 Ill. 13.

[3] Roberts *v.* Fleming, 53 Ill. 196; Harrison *v.* Roberts, 6 Fla. 711; Walthall *v.* Rives, 34 Ala. 92.

[4] Griffin *v.* Marine Co. of Chicago, 52 Ill. 130.

[5] Ford *v.* Olden, L. R. 3 Eq. 461; 36 L. J. C. 651.

[6] Per Wood, V. C., in Kirkwood *v.* Thompson, 2 J. & H. 392.

[7] Watson *v.* Sherman, 84 Ill. 263. See § 1880.

[8] Munn *v.* Burges, 70 Ill. 604; Bush *v.* Sherman, 80 Ill. 160; Hoit *v.* Russell, 56 N. H. 559; Whitehead *v.* Hellen, 76 N. C. 99.

and to place the trustee beyond the reach of temptation, the law allows the *cestui que trust* to set aside such a sale at his option without showing that he has been in any way injured. A mortgage with a power of sale confers a trust coupled with an interest, but the rule applies with the same force as in the case of a naked trust. Without the agreement or consent of the mortgagor he can acquire no title by a purchase directly or indirectly at his own sale under the power.[1]

1878. The rule applies equally to the mortgagee's solicitor. If the power of sale does not give to the mortgagee any right to purchase, his solicitor or agent is equally with himself disabled from becoming the purchaser of the property either for himself or for another. The mortgagee in such case occupies a fiduciary relation to others, and his solicitor who conducts the sale stands in the same position he does as regards a purchase of the property.[2] He is bound by the same obligations to secure the best possible results, regardless of the interest of all other persons, except the mortgagor and mortgagee. Neither can he act for a third party having a different interest, in nowise identical with the interest of those for whom he is first bound to act. By reason of his relations to the mortgagee he is bound to get the highest price; and if he act for another person in buying, he is bound to obtain the property at as low a price as he can. These characters are utterly inconsistent, and the policy of the law does not allow them to be united in the same person.[3] Even the employment by a purchaser of a clerk of the mortgagee's solicitor to bid for him at the sale is sufficient to invalidate it.[4]

1879. Mortgagee's agent. — Doubts were at first expressed whether one who has acted as the agent of the mortgagee in surveying the property, advancing the money, and receiving the in-

[1] Thornton *v.* Irwin, 43 Mo. 153; Rutherford *v.* Williams, 42 Mo. 18; Blockley *v.* Fowler, 21 Cal. 326.

[2] "Perhaps he is upon principle the person of all others disabled," said Lord Eldon, in *Ex parte* Bennett, 10 Ves. 381, 385. "As to the solicitor," says the same judge, *Ex parte* James, 8 Ves. 337, 346, "if there is any utility in applying the principal against the assignee, the application as against the solicitor is more loudly called for." See, also, on the general subject, Orme *v.* Wright, 3 Jur. 19; York Buildings Association *v.* Mackenzie, 8 Brown Parl. Cas. App. 42; Downes *v.* Grazebrook, 3 Mer. 209; Fox *v.* Mackreth, 2 Bro. C. C. 400; Whitcomb *v.* Minchin, 5 Mad. 91; Gardner *v.* Ogden, 22 N. Y. 327; Campbell *v.* Swan, 48 Barb. (N. Y.) 109.

[3] Dyer *v.* Shurtleff, 112 Mass. 165.

[4] Parnell *v.* Tyler, 2 L. J. Ch. N. S. 195.

terest, is a competent purchaser under the power; but on appeal the chancellor expressly held that he could not purchase.[1] For stronger reasons, one who has acted for the mortgagee in advertising the property and in making the sale cannot properly purchase at the sale.[2]

When, however, the mortgagee is authorized by the deed to purchase at the sale, he may properly arrange beforehand with a third person to bid a sum not less than the amount of the mortgage and the incidental expenses, as such an arrangement has no tendency to prevent competition at the sale, or to depreciate the price; but on the contrary makes it certain that the sale will at least pay the mortgage debt.[3]

1880. Under the same rule a trustee in a deed of trust cannot buy for his own benefit at the trust sale.[4] But the mere fact that the trustee, after a sale by him to a third person, purchased the premises of him does not vitiate the original sale. "Whether culpable or commendable depends upon the circumstances of each case. It may be wrong, and it may be right. It may be approved by the parties interested and affirmed. It may be condemned by them and avoided. When it is found that the transaction is itself fair and honest, that the purchase was not contemplated at the original sale, but was first thought of years afterwards, and was then made for a full and fair consideration actually paid by the trustee, and after the fiduciary duty was at an end, we find no authority to justify us in pronouncing the original sale to have been fraudulent."[5] If a trustee buys in a prior mortgage he will hold it for the benefit of his *cestui que trust*, upon being reimbursed the amount he has fairly paid for it.[6]

1881. Perhaps there is less strictness in applying the rule to the case of a mortgagee purchasing at his own sale under the power than there is in the case of a trustee purchasing. The mortgage, in such case is not merely a trustee, but he is also a *cestui que trust*, and if he were not allowed to become a purchaser under any circumstances his security might become greatly impaired.[7] Accordingly it has been held that where such a pur-

[1] Orme *v.* Wright, 3 Jur. 19, 972.

[2] Hoit *v.* Russell, 56 N. H. 559.

[3] Dexter *v.* Shepard, 117 Mass. 480.

[4] Lass *v.* Sternberg, 50 Mo. 124; Stephen *v* Beall, 22 Wall. 329, 340.

[5] Mr. Justice Hunt, in Stephen *v.* Beall, *supra*. See § **1876**.

[6] Crutchfield *v.* Haynes, 14 Ala. 49; Gunter *v.* Janes, 9 Cal. 643.

[7] In Bergen *v.* Bennett, 1 Caines (N. Y.) Cas. 1, 19, Judge Kent said: "It has been

chase is made with the knowledge and consent of the mortgagor, in the absence of all suspicion of fraud, it is good and valid.[1] At any rate the mortgagor would not be allowed to avoid the sale after waiting several years.[2] The purchase being made with the mortgagor's consent is the same thing in effect as a conveyance of the equity by the mortgagor to the mortgagee at private sale.

When the creditor or his agent buys at a trustee's sale no objection to the sale can be taken because the purchase money is not actually paid to the trustee. It would be an idle ceremony to pay over the money and immediately receive it back again.[3]

1882. When the sale is made by judicial process there is usually no restraint upon the purchase of the property by the mortgage creditor.[4] The sale is in such case made by a sheriff or other officer appointed by the court or designated by law, and the creditor is not himself the seller. The case is just the same as that of a sale upon an ordinary execution at which the judgment creditor has full liberty to buy.[5] And so also in those states in which there are statutes which regulate all sales under powers in mortgages, prescribing in detail the notices that must be given, and specifically providing for the conduct of the sale, which is made by a public officer, there is not the same objection to the mortgagee's becoming the purchaser, and therefore these statutes generally provide also that the mortgagee may fairly and in good faith purchase the whole or any part of the property.[6]

The mortgagee may purchase at a sale under a power that runs to himself, if the sale is made in good faith, by the sheriff, in accordance with the statute;[7] but not if his own agent acts as auctioneer and makes the certificate and affidavit of sale.[8] Under a trust deed, when the sale is made by a disinterested trustee, the

made a question, whether the rule would apply to the case of a trustee who was himself a *cestui que trust*, and was obliged to purchase, in order to avoid a loss to himself by a sale at a less price." But he forebore to express any opinion whether the distinction was well taken or not. See, also, Hyde *v.* Warren, 46 Miss. 13, 29.

[1] Dobson *v.* Racey, 8 N. Y. 216.

[2] Medsker *v.* Swaney, 45 Mo. 273; Bergen *v.* Bennett, 1 Caines (N. Y.) Cas. 1, 19.

[3] Weld *v.* Rees, 48 Ill. 428; and see Jacobs *v.* Turpin, 83 Ill. 424; Beal *v.* Blair, 33 Iowa, 318.

[4] As in **Maryland**: § 1740.

[5] Stratford *v.* Twynam, Jac. 418.

[6] As in **New York**: § 1751.
Michigan: § 1741.
Wisconsin: § 1762.
Illinois: § 1733.
Minnesota: § 1743.
Rhode Island: § 1756.

[7] Ramsey *v.* Merriam, 6 Minn. 168.

[8] Allen *v.* Chatfield, 8 Minn. 435.

beneficiary may ordinarily purchase. The holder of a note secured by a trust deed may buy at the sale. He may leave a bid with the auctioneer, and the purchase under it will be valid if it is the highest that can be obtained;[1] but if there is any unfairness on his part, such as a representation at the sale that the mortgagor would have a right to redeem from the sale within twelve months, when there was no such right of redemption, and the property in consequence brought only about half its value, it will be held that the sale may be avoided.[2]

In Missouri, however, it is held that where the mortgage provides for a sale by the mortgagee, or in case of his refusal to act, by the marshal, they are for the purposes of the sale co-trustees, and the mortgagee cannot, by refusing to make the sale, relieve himself of his disability to purchase at the sale by the marshal.[3]

In New York the mortgagee by statute is allowed to purchase at the sale;[4] but independently of the statute, it was there held that he had a perfect right to purchase at his own sale.[5] He is not there regarded as occupying a fiduciary relation to the mortgagor. The foreclosure and sale, when the mortgagee becomes the purchaser, is as complete a bar of the equity of redemption as when any one else becomes the purchaser.[6] An agent may bid for him at the sale without disclosing the fact of the agency; and this is no fraud on other bidders, as he has a right to buy and would be bound to take the property if struck off to him.[7]

In Mississippi the court in a recent case cited cases in which this right was said to be recognized, but gave no opinion upon it.[8]

In Texas it is held that the mortgagee may purchase at his own sale under a power, if there be no unfairness in it. It is declared to be for the interest of the mortgagor that the mortgagee should enter into competition at the sale. The sale being open and made after proper publication of notice should not be impeached though made to the mortgagee.[9]

1883. A provision in express terms that the mortgagee

[1] Richards *v.* Holmes, 18 How. (U. S.) 143.

[2] Bloom *v.* Rensselaer, 15 Ill. 503.

[3] Gaines *v.* Allen, 58 Mo. 537.

[4] 3 R. S. 6th ed. 847, § 7.

[5] Elliott *v.* Wood, 53 Barb. (N. Y.) 285; aff'd 45 N. Y. 71; Hubbell *v.* Sibley, 5 Lans. (N. Y.) 51; Bergen *v.* Bennett, 1 Caines (N. Y.) Cas. 1; Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48.

[6] Lansing *v.* Goelet, 9 Cow. (N. Y.) 346.

[7] National Fire Ins. Co. *v.* Loomis, 11 Paige (N. Y.), 431.

[8] Hyde *v.* Warren, 46 Miss. 13.

[9] Howards *v.* Davis, 6 Tex. 174.

may purchase is usually found in the mortgage deed, where power of sale mortgages are in general use, and there is no statute authorizing the mortgagee to purchase at his sale under the power. It has sometimes been declared that this privilege should be strictly construed and should not be favored;[1] but it is generally held that under such a provision the court will not interfere with a purchase by the mortgagee, unless there be some other objection which would generally invalidate a purchase by any one else under the same circumstances.[2] The right of the mortgagee to purchase under such a provision is fully sustained by the courts. Lord Eldon clearly intimates that under such authority a trustee might become a purchaser of the trust property;[3] and a mortgagee is not a mere trustee, but has interests of his own to protect.[4]

If the mortgagee avails himself of his right to purchase under a provision in the power giving him this privilege, he will be held by a court of equity to the strictest good faith and the utmost diligence in the execution of the power for the protection of the

[1] Munn *v.* Burges, 70 Ill. 604; Griffin *v.* Marine Co. of Chicago, 52 Ill. 130.

[2] Elliott *v.* Wood, 45 N. Y. 71; Montgomery *v.* Dawes, 12 Allen (Mass.), 397; and see Davey *v.* Durrant, 1 De G. & J. 535.

[3] Downes *v.* Grazebrook, 3 Mer. 200. He says: "A trustee for sale is bound to bring the estate to the hammer under every possible advantage to his *cestui que trust*. He may, if he pleases, retire from being a trustee, and divest himself of that character, in order to qualify himself to become a purchaser; and so he may purchase, not indeed from himself as trustee, but under a specific contract with his *cestui que trust*. But, while he continues to be a trustee, he cannot, without the express authority of his *cestui que trust*, have anything to do with the trust property as a purchaser." In Elliott *v.* Wood, *supra*, Mr. Justice Allen said: "Powers of sale are construed liberally for the purpose of effecting the general object, and neither the interest of the mortgagee nor mortgagor will be advanced by forbidding purchase by the mortgagee. The security of the mortgagee would be less valuable, and the mortgagor would lose the benefit of the competition of the mortgagee upon the sale." In the case of Griffin *v.* Marine Co. of Chicago, 52 Ill. 130, it was said that the clause, conferring upon the mortgagee the right to purchase at his own sale, is subject to a strict construction, and to be regarded with disfavor by the courts. It is conceived that this is an erroneous view of the subject, whatever may be thought of the correctness of the decision of the case before the court. The mortgage there authorized the mortgagee "to become purchaser at said sale, or any member or members of the firm of H. A. Tucker & Co. may become a purchaser at such sale, provided his or her bid for said property, or any portion thereof." It was held that the right to purchase was intended to be upon conditions not fully expressed, and the language not being intelligible, the clause should be disregarded entirely; and, therefore, that the mortgagee had no power to purchase.

[4] Waters *v.* Groom, 11 Cl. & Fin. 684.

rights of the mortgagor, and his failure in either particular will give occasion to allow the mortgagor to redeem.[1]

1884. This rule has no application to a subsequent mortgagee who buys at a sale under a prior mortgage, although under his own security he holds the position of a trustee to sell, and is debarred from purchasing at a sale under his own power.[2] This decision of the Master of the Rolls in the leading case of *Shaw* v. *Bunny* was affirmed by the Court of Appeals in Chancery,[3] where Lord Justice Knight Bruce said: "There being, I think, not any special circumstance in the present instance to prejudice or affect the purchaser's right, his title against the mortgagor to the benefit of the purchase seems to me, also, as absolute as that of a mere stranger purchasing would have been. I consider, I repeat, in accordance with the view of the Master of the Rolls, that there was nothing to preclude the second mortgagee from buying in the circumstances in which he bought, and retaining his purchase. If, indeed, he had availed himself of his position as a mortgagee to procure some facility or advantage leading to the purchase, or connected with it, that might have made a difference. But I see no such case. It seems to me immaterial that the purchaser would not (if he could not) have been informed of the intended sale had he not been a mortgagee."

But if the second incumbrancer is not merely a mortgagee, but holds the equity of redemption in trust for sale on default in the

[1] Montague *v.* Dawes, 14 Allen (Mass.), 369.

[2] Shaw *v.* Bunny, 33 Beav. 494; 2 De G., J. & S. 468; Kirkwood *v.* Thompson, 2 J. & H. 392; 11 Jur. N. S. 385; 2 De G., J. & S. 613; Parkinson *v.* Hanbury, 1 De G. & Sm. 143; 2 De G., J. & S. 450.

[3] Shaw *v.* Bunny, 13 W. R. 374; 2 De G., J. & S. 468. The sale in this case was not by auction but private. Lord Justice Turner, who also sat in this case, expressed some doubt as to the view taken by his associate and by the Master of the Rolls; but as remarked by Lord Chancellor Cranworth, in Kirkwood *v.* Thompson, 2 De G., J. & S. 613, the authority of the decision is in no way affected thereby. The Lord Chancellor moreover approved the decision, and supported it by strong arguments. After showing that a mortgagee can purchase from his mortgagor he said: "The next step is, can he purchase under a power of sale executed by a first mortgagee?

It seems to me to follow as a necessary corollary, because the sale that is made under the power of sale by a first mortgagee is substantially a sale by the mortgagor, for it is a sale made under an authority given by the mortgagor paramount to the title of the second mortgagee. It seems to me, that on the principle of the case there is no difference whatever between a purchase from a first mortgagee under a power of sale and a purchase from the mortgagor himself."

payment of the debt, he is incapacitated from purchasing at a sale by the first mortgagee. He is in such case a trustee.[1]

The circumstances, however, that the second mortgage is in the form of a conveyance in trust to sell, and out of the proceeds to pay the debt secured to the grantee and all other incumbrances, and pay over the surplus to the mortgagor, does not prevent his purchasing under the prior mortgage.[2] "As between the mortgagor, the person conveying, and the person to whom it was conveyed in trust to sell, it certainly was a mortgage as far as he was concerned. He took possession, and he taking possession would be liable to account as mortgagee. It cannot be contradicted that between the parties conveying and the parties to whom it was conveyed, it certainly was a mortgage. It is possible — I do not say whether that would be so — that there might have been different duties as between him and the mortgagor if he had sold, than would have existed in the case of a simple mortgage. But what took place is something that comes in paramount and prior to the exercise of the duties as trustee; he never can sell, because persons having a paramount title to his title choose to exercise that right, and therefore prevent the possibility of his exercising his right, which is a trust only to arise if it was ever in his power to sell, which it was not, in consequence of the sale made by the prior mortgagees." [3]

It is, moreover, immaterial that the second mortgagee is in possession at the time of this purchase under the power in the first mortgage. His possession creates no new obligation except to account. Otherwise his relation as mortgagee remains the same as if he had not been in possession.[4] The fact of his possession does not prevent his purchasing the equity of redemption on an execution sale had upon a judgment in favor of a third person.[5]

1885. The right to avoid such a sale is waived by delay. When a mortgagee purchases at a sale under a power in a mortgage, which does not give him the right to purchase, the equitable owner may set it aside and recover the property, or he may at his election affirm it and have the price obtained applied to the mortgage debt and receive the surplus if there be any. But

[1] Parkinson *v.* Hanbury, 2 De G., J. & S. 450.

[2] Kirkwood *v.* Thompson, 2 De G., J. & S. 613.

[3] Per Lord Chancellor Cranworth in Kirkwood *v.* Thompson, *supra*.

[4] Kirkwood *v.* Thompson, *supra*.

[5] Ten Eyck *v.* Craig, 62 N. Y. 406.

this right to avoid the sale will be treated as waived unless asserted within a reasonable time.[1] What delay will be regarded as a waiver of this right depends upon the circumstances of the case; there can, of course, be no fixed rule. After a lapse of thirteen years, during which no payment of interest or principal had been made or offered by any one on account of the mortgage debt, the owner of the equity of redemption was not allowed to redeem, though he was not notified of the sale and had no actual knowledge of it.[2]

1886. If the title acquired by a mortgagee in this way has passed into the hands of a bona fide purchaser without notice, and for an adequate consideration, the sale cannot afterwards be impeached.[3] Such a sale being voidable only, and not void, the title passes to the nominal purchaser, and any proceedings to set aside the sale, to be effectual, must be commenced before he conveys to another who purchases in good faith.

1887. A mortgagor may purchase at a sale under his own mortgage; but if he has given a subsequent mortgage upon the same property, his purchase will not defeat this; but will operate for the benefit of it in the same way as a discharge, or a transfer of the mortgage to himself.[4] He cannot set up against his own incumbrance another one which he has himself created. Whether the mortgagor would stand in any better position as regards the subsequent incumbrancer, if, instead of purchasing directly under the power, the estate had been sold under the power to a stranger and subsequently purchased from such stranger by the mortgagor, is a question raised but not decided in the case last cited.

A subsequent purchaser of an undivided half of the mortgaged premises may purchase them at a sale under the power. His re-

[1] Nichols *v.* Baxter, 5 R. I. 491; Munn *v.* Burges, 70 Ill. 604; Joyner *v.* Farmer, 78 N. C. 196.

[2] Learned *v.* Foster, 117 Mass. 365.

[3] Dexter *v.* Shepard, 117 Mass. 480; Burns *v.* Thayer, 115 Mass. 89; Benham *v.* Rowe, 2 Cal. 387; Blockley *v.* Fowler, 21 Cal. 326; Rutherford *v.* Williams, 42 Mo. 18; Robinson *v.* Cullom, 41 Ala. 693; Thurston *v.* Prentiss, 1 Mich. 193; Niles *v.* Ransford, 1 Mich. 338.

[4] Otter *v.* Lord Vaux, 6 De G., M. & G. 638. This principle, that a mortgagor cannot set up an after-acquired title against his own incumbrancer, has been carried to the extent of holding that a mortgagee, purchasing the equity of redemption, could not set up his own mortgage against a subsequent mortgage made by the same mortgagor. But in Toulmin *v.* Steere, 3 Mer. 210, the correctness of this proposition has been questioned, and cannot now be regarded as law. Otter *v.* Lord Vaux, *supra*.

lations to the mortgagor are not of such a confidential nature as prevent his buying.[1]

1888. The wife of the mortgagor may become a purchaser under the power of sale, and hold the estate as her sole and separate property, when the conveyance is made to her in the name of the mortgagee, and not as attorney of the mortgagor. The technical objection, that a husband cannot directly convey to his wife, does not apply.[2] It would seem on principle that it would make no difference as to the wife's right to purchase whether the husband had before the sale parted with his equity of redemption, though in the case cited he had already conveyed his interest; for the mortgagee had the legal title, and he could without doubt assign his mortgage to the mortgagor's wife. It is different from the case of a purchase of an equity of redemption on execution by the wife of the judgment debtor. The sheriff has no title and exercises only a statute power; and the husband has a right to redeem, which he could not enforce by suit against his wife. Such a sale, if it could be made, would operate as a conveyance of the husband's title directly from him to his wife.[3]

12. *The Deed and Title.*

1889. Holder of legal title should make the deed under the power of sale. The assignee has the same authority in this respect that the mortgagee himself had if the power is expressly given to his assigns.[4] Upon the death of the assignee his executor or administrator may execute the power, though it be only to the mortgagee, "his heirs, executors, administrators, or assigns."[5] Under a statute providing for a sale under the power by a sheriff or other officer, such officer stands in the place of the mortgagee in exercising the power of sale; he executes the deed to the purchaser by virtue of the power. The provision of statute has the same effect as if made part of the mortgage deed.[6]

So, also, a trustee selling under a deed of trust conveys the title and estate that was vested in him by the trust deed. He is not required to enter into any personal covenants himself against general incumbrances, though he usually covenants against such as

[1] Burr *v.* Mueller, 65 Ill. 258.
[2] Field *v.* Gooding, 106 Mass. 310.
[3] Stetson *v.* O'Sullivan, 8 Allen, 321.
[4] Heath *v.* Hall, 60 Ill. 344.
[5] Saloway *v.* Strawbridge, 1 Jur. N. S. 1194; 7 De G., M. & G. 594; 1 K. & J. 371.
[6] Hoffman *v.* Harrington, 33 Mich. 392.

are done or suffered by himself. The purchaser is bound to know that there can be no personal warranty of title. He is also bound to take notice of the title as it stands in the trustee with all its defects as it appears of record.[1]

A trustee can make but one sale and deed, and if he attempts to make a second deed the grantee will take no title.[2]

The deed should recite the power by virtue of which the sale is made, though perhaps such a recital is not necessary as a matter of law.[3] If the deed be made by an attorney of the mortgagee, his authority should be evidenced by a writing under seal, although the power of sale expressly authorizes the mortgagee, his legal representatives, or attorney, to convey. But a deed executed by an attorney not so authorized may be regarded as conveying to the purchaser an equitable interest in the premises, which he may set up in bar of a suit in equity to have the sale set aside.[4]

1890. If the mortgagee be a married woman she may execute the power of sale in her own name, and it is not necessary for her husband to join in the conveyance or consent thereto in writing, as is provided by statute in case of a conveyance of her own real property.[5]

1891. When the power authorizes the donee to execute a deed in the name of the mortgagor, or as his attorney, it must be so executed; and the deed of sale will then be the deed of the donor of the power and not of the donee.[6] In such case if the deed be in the name of the mortgagee, although it may not convey a good title in fee simple at law, it will pass an equity to the grantee.[7] But the power was formerly and is now more frequently given to be exercised by the donee, and in such case the deed of sale must be executed in the name of the donee of the power.[8] It is often the case that the power is given in the alternative, and then the deed of sale may be executed in either form, or in both forms. When the power is "to make, execute, and deliver to the purchaser or purchasers thereof all necessary conveyances for the purpose of vesting in such purchaser or purchasers the premises so sold in fee simple absolute," it may be executed by the

[1] Barnard *v.* Duncan, 38 Mo. 170.
[2] Koester *v.* Burke, 81 Ill. 436.
[3] Smith *v.* Henning, 10 W. Va. 596.
[4] Watson *v.* Sherman, 84 Ill. 263.
[5] Cranston *v.* Crane, 97 Mass. 459.
[6] Speer *v.* Haddock, 31 Ill. 439.
[7] Mulvey *v.* Gibbons, 87 Ill. 367.
[8] Munn *v.* Burges, 79 Ill. 604.

deed of the mortgagee in his own name; though it might, perhaps, be executed by him as the attorney of the mortgagor.[1]

An administrator who has taken a power of sale mortgage in which he is described as administrator should execute a deed under the power contained in the mortgage in his own name, right, and character, and not as administrator, as he does not hold the land in that character, and cannot exercise the power in that capacity.[2]

1892. A mortgagee purchasing may make a deed to himself. The courts have, in some instances, intimated that upon a sale under a power in a mortgage, the mortgagee, although authorized by the terms of the power to become a purchaser at the sale, cannot make the deed directly to himself; but must convey to a third person.[3] But in a recent case in Massachusetts it was decided that under a mortgage which provided that the mortgagee might purchase at the sale, and that the deed to the purchaser might be made by the mortgagee, either as the attorney of the mortgagor or in his own name, a deed executed in both forms to himself directly was valid.[4] From the principles on which the decision is based it would seem that the court would have held that the mortgagee might have made the deed in his own name directly to himself, and that the validity of it did not depend upon the execution of it to himself in the name of the mortgagor. "Such a mortgage," says Gray, Ch. J., "vests a seisin and a conditional estate in the mortgagee, with a power superadded to convey an absolute estate by a sale pursuant to the terms of the power. The execution of the power does but change, in accordance with the terms of the mortgage deed, the uses upon which the estate is to be held. The purchaser at the sale takes not as the grantee of the mortgagee, but as the person designated or appointed by the mortgagee in execution of the power, and derives his title from the mortgagor, as if the designation or appointment had been inserted in the original deed, and the seisin or interest to serve the estate is raised by that deed. . . . . The decision in *Field* v. *Gooding*,[5] that upon a sale under a power in a mortgage the wife of the mortgagor might be the purchaser, and have the

[1] Cranston *v.* Crane, 97 Mass. 459.
[2] Wilkinson *v.* Allen, 67 Mo. 502.
[3] Dexter *v.* Shepard, 117 Mass. 480; Jackson *v.* Colden, 4 Cow. (N. Y.) 266.
[4] Hall *v.* Bliss, 118 Mass. 554. And see Hood *v.* Adams, 124 Mass. 481.
[5] 106 Mass. 310.

estate conveyed to her, is in nowise inconsistent with this view. The fact that the husband had previously sold the equity of redemption relieved that case from the difficulties which might have existed if he had owned it at the time of the sale.[1] The intervention of the mortgagee as donee of the power removed the technical objection that the husband could not convey directly to his wife. The suggestions in *Dexter* v. *Shepard*,[2] and in *Jackson* v. *Colden*,[3] that upon a sale under the power in a mortgage, the deed could not be made by the mortgagee to himself, were by way of argument only, and not of adjudication; for in *Dexter* v. *Shepard* the purchase and conveyance were made through a third person; and in *Jackson* v. *Colden* the court held that under a statute containing provisions similar to those of this mortgage, no deed was necessary when the mortgagee became the purchaser at the sale; and although the counsel on both sides, and the other judges, assumed that it would be impossible to make such a deed, Chief Justice Savage implied that, if any deed was necessary, a deed from the mortgagee to himself would be valid."

1893. In New York by statute no deed is necessary when the mortgagee himself becomes the purchaser, and it is said that under the statutes as they now stand no deed is necessary in any case to perfect the title in the purchaser.[4] The affidavits in such case have the force and effect of a deed.[5] Until they are made, no title vests in the purchaser. The mortgagee, in such case, in order to maintain ejectment upon his title, must show that all the requirements of the statute have been complied with and the affidavits completed before the commencement of the action.[6] Unless it appears by the affidavits on file that the notice was served on the mortgagor, the sale will not give any title to the purchaser.[7]

1894. After a sale under a power the title as a general rule remains unaffected until a deed is executed and delivered by the mortgagee to the purchaser. The auction sale does not vest the title in the purchaser.[8] Upon the delivery of the deed the purchaser is entitled to the possession of the property, and he may

[1] See Tucker *v.* Fenno, 110 Mass. 311.

[2] 117 Mass. 480.

[3] 4 Cow. (N. Y.) 266.

[4] Thomas on Mort. 420.

[5] See § 1660; Jackson *v.* Colden, 4 Cow. (N. Y.) 266.

[6] Tuthill *v.* Tracy, 31 N. Y. 157; Layman *v.* Whiting, 20 Barb. (N. Y.) 559; Bryan *v.* Butt, 27 Ib. 503; Howard *v.* Hatch, 29 Ib. 297.

[7] Dwight *v.* Phillips, 48 Barb. (N. Y.) 116.

[8] Tripp *v.* Ide, 3 R. I. 51. See § 1653, for delivery of deed under judicial sales.

maintain a writ of entry to recover it.[1] In New York, where no deed is necessary to the passing of the title, the foreclosure has sometimes been said to be complete, so far as to bar the equity of redemption, as soon as the sale is made;[2] though according to some authorities the right of possession remains in the mortgagor till the affidavits are made and recorded;[3] and until this be done there is no transfer of title sufficient to authorize an action of ejectment by the purchaser. The recorded affidavits operate as a statutory transfer of title.[4] In New York, moreover, the purchaser, instead of being obliged to resort to an action of ejectment to enforce his right of possession of the mortgaged premises, may now recover possession by the summary process used in landlord and tenant cases.[5]

1895. The deed is not evidence of recitals in it. A deed made in pursuance of a power of sale by the mortgagee, trustee, or sheriff, is by itself no evidence of a regular foreclosure of a mortgage.[6] It is sometimes provided in deeds of trust that the recitals contained in the trustee's deed of sale under the power shall be *primâ facie* evidence of the facts stated in it. But in the absence of such a provision the recitals are either regarded as affording no evidence of their truth;[7] or as being at most *primâ facie* evidence of the facts they recite.[8]

The deed made in pursuance of the power usually refers to the power, and recites the substance of it; but this is not absolutely essential, if it is otherwise manifest that the intention of the mortgagee was to execute the power. If such intention is not manifest, a simple deed by the mortgagee will be held to convey only his mortgage interest subject to redemption.[9] A deed which represents the sale as one made in bulk for a single bid is not a proper one where the sale was in fact in separate parcels and for several bids.[10]

[1] Lydston *v.* Powell, 101 Mass. 77; Cranston *v.* Crane, 97 Mass. 459.

[2] Tuthill *v.* Tracy, 31 N. Y. 157; Mowry *v.* Sanborn, 7 Hun (N. Y.), 380; 68 N. Y. 153.

[3] Arnot *v.* McClure, 4 Den. (N. Y.) 41; Layman *v.* Whiting, 20 Barb. (N. Y.) 559.

[4] Mowry *v.* Sanborn, *supra.*

[5] Laws, 1874, c. 208.

[6] Barman *v.* Carhartt, 10 Mich. 338.

[7] Vail *v.* Jacobs, 62 Mo. 130; Neilson *v.* Chariton Co. 60 Mo. 386; Carter *v.* Abshire, 48 Mo. 300; Hancock *v.* Whybark, 66 Mo. 672.

[8] Ingle *v.* Jones, 43 Iowa, 286; Beal *v.* Blair, 33 Iowa, 318.

[9] Pease *v.* Pilot Knob Iron Co. 49 Mo. 124.

[10] Grover *v.* Fox 36 Mich. 461.

1896. The deed may be made to a person other than the purchaser by his consent and direction. It is often the case that the bidder at the sale transfers his bid to another and directs the deed to be made to such person, and if there be no fraud in the transaction and no loss to the mortgagee thereby, there can be no objection to the transaction. But even if objection could be urged by an immediate party to the sale it cannot be set up in an action of ejectment against remote purchasers without any notice of the irregularity to defeat their title.[1] If the purchaser die before the conveyance is executed this does not avoid the sale, but the deed may be made to his executor or administrator in his official capacity upon payment of the purchase money.[2]

1897. The purchaser takes a title divested of all incumbrances made since the creation of the power.[3] "It has been established ever since the time of Lord Coke, that where a power is executed the person taking under it takes under him who created the power, and not under him who executes it."[4] The purchaser takes all the mortgagor's equity of redemption, and all the mortgagee's title under the mortgage.[5] But he does not take an independent title acquired by the mortgagee, or a right reserved to him as grantor in the original deed to the mortgagor.[6] A sale under a power is equivalent to a foreclosure and sale under a decree in equity, and cannot be defeated to the prejudice of one purchasing in good faith.[7] The sale is not impaired or affected in any way by reason that any person interested in the property is at the time under a legal disability.[8]

The doctrine that a purchaser from a trustee with notice of the trust shall be charged with the same trust, has no application to sales of trust estates at public auction, under the terms of the power contained in the trust deed.[9]

Even if the purchaser under the power omits to record his deed, a subsequent purchaser from the mortgagor has no right of re-

[1] Johnson *v.* Watson, 87 Ill. 535; 8 Cent. L. J. 26.

[2] § 1652; Lewis *v.* Wells, 50 Ala. 198. § 1654; Doolittle *v.* Lewis, 7 Johns. (N Y.) Ch. 45; Bancroft *v.* Ashhurst, 2 Grant (Pa.), 513; Sims *v.* Field, 66 Mo. 111. Lord Tenterden, C. J., in Wigan *v.* Jones, 10 B. & C. 459.

[5] Hall *v.* Bliss, 118 Mass. 554; Torrey *v.* Cook, 116 Mass. 163; Brown *v.* Smith, 116 Mass. 108.

[6] Walsh *v.* Macomber, 119 Mass. 73.

[7] Jackson *v.* Henry, 10 Johns. (N. Y.) 185; and see Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 129, 147.

[8] Demarest *v.* Wynkoop, *supra.*

[9] Wood *v.* Augustine, 61 Mo. 46.

demption. The record of the mortgage is sufficient to put all persons upon inquiry whether any proceedings have been had under the power of sale.[1]

1898. Bona fide purchaser. — One who purchases at a sale under a power without notice, actual or constructive, of any irregularity in the proceedings, acquires a valid title,[2] although the mortgagor might redeem as against the person making the sale, as where payment of the mortgage debt has been tendered to the holder of the mortgage. Where the power authorizes the mortgagee to become a purchaser, and title is made to him accordingly, a *bonâ fide* purchaser from him without notice is not prejudiced by such irregularity on his part in making the sale.[3] To defeat a sale under the power, the mortgagor should immediately follow up the tender by a suit to redeem; otherwise a third person without notice of any defect in the proceedings, or of any facts that should put him as a reasonable man upon inquiry, may gain a good title, and the mortgagor will then be unable to redeem against him, although he might against the purchaser at the sale.[4] If the purchaser be cognizant of any fraud or unfair dealing in the sale, he acquires no title by it;[5] as where he has agreed with the mortgagee's agent to share the profits of the purchase, and he has bought the property at a grossly inadequate price.[6]

Although the mortgage has in fact been paid, if not discharged of record, a sale regularly made under the statute to a *bonâ fide* purchaser is held in New York to be equivalent to a sale under a decree in equity, and is therefore an entire bar, both as against the mortgagor and all persons claiming under him.[7] They can only impeach the sale by showing that the proceedings were not regular and effectual in form. Fraud on the part of the mortgagee or holder of the mortgage will not defeat the title of such purchaser. Usury, or any other matter affecting the validity of the

[1] Farrar *v.* Payne, 73 Ill. 82; Heaton *v.* Prather, 84 Ill. 330. See § 557.

[2] Sternberg *v.* Dominick, 14 Johns. (N. Y.) 435; Jackson *v.* Henry, 10 Johns. (N. Y.) 185.

[3] Digby *v.* Jones, 67 Mo. 104.

[4] Montague *v.* Dawes, 12 Allen (Mass.), 397; Hoit *v.* Russell, 56 N. H. 559.

[5] Jackson *v.* Crafts, 18 Johns. (N. Y.) 110; and see Hamilton *v.* Lubukee, 51 Ill. 415.

[6] Mann *v.* Best, 62 Mo. 491.

[7] Warner *v.* Blakeman, 36 Barb. (N. Y.) 501; 4 Keyes, 487.

This case substantially overrules the dicta of Mr. Justice Cowen, that the purchaser would acquire no title under the sale, the mortgage being void after payment. Cameron *v.* Irwin, 5 Hill (N. Y.), 272.

mortgage, will not affect the validity of the title acquired by an innocent purchaser.[1] If the mortgage be void, or if it has been paid, a purchaser with notice acquires no title; but the mortgage appearing of record to be valid, a purchaser without notice does acquire title.[2]

Although a part of the mortgaged premises has been released from the operation of the mortgage, if the release be not recorded, and the part released be sold with the rest to a *bonâ fide* purchaser without notice, he will hold the entire property, the release having no effect as to him.[3]

The sale under a power is equivalent to a foreclosure and sale in equity, and a *bonâ fide* purchaser is protected in the same manner and to the same extent.[4]

1899. The title of one purchasing in good faith under a power of sale is unaffected by any agreement between the parties to the mortgage, that the sale should be deferred in consideration of the payment of the interest due;[5] or that no sale should be made without giving personal notice of it to the mortgagor;[6] or because a tender had been made to the mortgagee before the sale of the amount due, which he had declined.[7] Those who have bought in good faith from the purchaser at the sale are not affected by any irregularities attending it, although these were known to their vendor, or he had been a party to some fraud attending it.[8]

In Illinois, however, it has been held that after the payment of the mortgage debt the mortgage itself is extinguished, and any sale made under a power contained in it is void even as against a *bonâ fide* purchaser. After such a sale, the purchaser being in possession, a court of equity may set aside the sale, and compel a reconveyance of the legal title, in order to remove the cloud.[9]

[1] Elliott *v.* Wood, 53 Barb. (N. Y.) 285.

[2] Cameron *v.* Irwin, 5 Hill (N. Y.), 272; Warner *v.* Blakeman, 36 Barb. (N. Y.) 501; 4 Abb. App. Dec. 530; Penny *v.* Cook, 19 Iowa, 538; Ledyard *v.* Chapin, 6 Ind. 320; Wade *v.* Harper, 3 Yerg. (Tenn.) 383.

[3] Palmer *v.* Bates, 22 Minn. 532.

[4] Jackson *v.* Henry, 10 Johns. (N. Y.) 185; Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48.

[5] Beatie *v.* Butler, 21 Mo. 313.

[6] Randall *v.* Hazelton, 12 Allen (Mass.), 412.

[7] Montague *v.* Dawes, 12 Allen (Mass.), 397.

[8] See Hamilton *v.* Lubukee, 51 Ill. 415.

[9] Redmond *v.* Packenham, 66 Ill. 434. And see per Cowen, J., in Cameron *v.* Irwin, 5 Hill (N. Y.), 272; Wood *v.* Colvin, 2 Hill (N. Y.), 566.

The fact that by mistake more land is sold by the mortgagee than his mortgage covers does not affect the validity of the sale as to so much of the land as he was entitled to.[1]

Where a statute declares a note tainted by usury to be wholly void, a sale under a power in a mortgage or trust deed securing such note confers no title when the mortgagee or beneficiary becomes the purchaser.[2] The sale would be a conclusive bar only in favor of a *bonâ fide* purchaser without notice, which a party to the usurious contract could not be.

1900. Under the English practice of conveyancing it is generally provided in the mortgage deed that the purchaser shall not be bound to inquire whether any default has been made, or whether any money remains due upon the security, or otherwise as to the propriety or regularity of the sale; and under such a provision the purchaser acquires a good title by a sale made in good faith, even if nothing remains due upon the mortgage.[3]

1901. Covenant for further conveyance. — Sometimes a covenant is inserted in the mortgage that the mortgagor shall in case of a sale under the power make such further conveyance as may be necessary for better effecting it, or will concur or join in the sale. A covenant of this sort is for the benefit of the mortgagee with whom it is made, and not of the purchaser.[4] As a matter of practical conveyancing, this is an important provision, as it often enables the mortgagee to obtain a release which will bar all inquiry into irregularities attending the sale.

1902. An invalid sale operates as an assignment of the mortgage. If the sale under the power is subsequently declared void for any irregularity, a purchaser who has paid the purchase money is subrogated to the rights of the mortgagee under the mortgage, which is regarded as assigned to him, and he may proceed anew to foreclose.[5] If the purchaser has subsequently sold the property by warranty deed, this amounts to an assignment of the mortgage to such grantee, who of course has the same right to

[1] Klock *v.* Cronkhite, 1 Hill (N. Y.), 107.

[2] Penny *v.* Cook, 19 Iowa, 538; Jackson *v.* Dominick, 14 Johns. (N. Y.) 435; Hyland *v.* Stafford, 10 Barb. (N. Y.) 558.

[3] Dicker *v.* Angerstein, 24 W. R. 844.

[4] Clay *v.* Sharpe, 18 Ves. 346; Corder *v.* Morgan, 18 Ves. 344.

[5] § 1678; Brown *v.* Smith, 116 Mass. 108; Burns *v.* Thayer, 115 Mass. 89; Johnson *v.* Robertson, 33 Md. 165; Gilbert *v.* Cooley, Walker, Ch. (Mich.) 494; Jones *v.* Mack, 53 Mo. 147; Russell *v.* Whitely, 59 Mo. 196; Stackpole *v.* Robbins, 47 Barb. (N. Y.) 212; Robinson *v.* Ryan, 25 N. Y. 320.

foreclose.[1] Under a deed of trust, the purchaser is subrogated to all the rights of the beneficiary.[2] When the sale was made without notice, the trustee's deed passes to the purchaser of the legal title, and, until redemption is had, enables him to maintain possession.[3] And so if the sale be made before a default the trustee's deed confers the legal title in trust for the benefit of the grantor.[4]

A purchaser at an irregular foreclosure sale obtains all the rights of the mortgagee, although the sale and conveyance are not made by the mortgagee himself, but by an officer acting under a statute regulating sales under powers in mortgages. The statute in such case becomes a part of the mortgage, and a sale made in pursuance of it is an exercise of the power conferred by the contract.[5] "The officer who sells merely stands in the shoes of the mortgagee and represents both parties."[6]

A mortgagee who takes possession of the mortgaged premises under a void sale is liable for the rents and profits received by him upon a subsequent redemption by the mortgagor. But to make him liable he must have had actual possession, or such a possession as would give him the enjoyment of the profits.[7] Such mortgagee would also be liable for waste committed or suffered by him while in actual possession of the premises. But if he is not in possession, and the injury done was not any act of his, or one which he could prevent, as, for instance, a destruction of buildings by the Confederate army, he is not responsible for it.[8]

If the mortgage debt has been paid before the sale, the purchaser obtains at most only a bare legal title, which he will hold for the benefit of the owner of the estate; and in states where payment alone, whenever made, is sufficient to revest the title in the mortgagor, the sale would be void.[9]

1903. The remedy against a purchaser who declines to complete a purchase made at a sale regularly conducted may be either by a bill in equity for a specific performance, or a suit at law for damages.[10] If the former remedy be waived, the property

[1] Niles *v.* Ransford, 1 Mich. 338.

[2] Ingle *v.* Culbertson, 43 Iowa, 265.

[3] Wilson *v.* South Park Commissioners, 70 Ill. 46.

[4] Chicago, Rock Island, &c. R. R. Co. *v.* Kennedy, 70 Ill. 350; Kœster *v.* Burke, 81 Ill. 436.

[5] Hoffman *v.* Harrington, 33 Mich. 392.

[6] Ib. per Mr. Justice Campbell.

[7] Bigler *v.* Waller, 14 Wall. 297.

[8] Bigler *v.* Waller, 14 Wall. 297.

[9] Furguson *v.* Coward, 57 Tenn. 572.

[10] Sherwood *v.* Saxton, 63 Mo. 78, and cases cited. See § 1680.

should be sold again; and if it brings a less sum, the former purchaser is liable at law for the difference in price and for the expenses attending the resale.[1]

It is a sufficient excuse for the purchaser's declining to complete his purchase, that the auctioneer offered the property free of incumbrances, and the purchase was made on that understanding, at the full value of the property, when in fact the property is incumbered by prior mortgages which are not removed before the tendering of a deed.[2]

13. *The Affidavit.*

1904. Neglect to make and file an affidavit of sale does not invalidate it. In Massachusetts, where a statute provides that the mortgagee, in case he sells without a decree of court, shall within thirty days after selling the property in pursuance of the power file a copy of the notice and his affidavit, setting forth his acts in the premises fully and particularly, in the registry of deeds,[3] it is held that the sale is good, and the title passes without complying with this provision, which is regarded only as directory, and not precluding other evidence of the execution of the power of sale.[4] In a late case,[5] Mr. Justice Colt said: "The provision is intended to secure the preservation of evidence that the conditions of the power of sale named in the deed have been complied with. It is for the protection of those claiming under the sale, and to prevent litigation. The title passes by the sale and deed, and immediately vests in the purchaser. It was not the intention to make it subject to a condition subsequent, and liable to be defeated by a failure of the mortgagee to perform an act which must follow the conveyance in point of time; and thus add to the conditions prescribed by the mortgagor in the deed."

Under a statute requiring an affidavit of the publication of the notice of sale to be made by the printer of the newspaper, an affidavit by one who states that he is the publisher of the paper is sufficient, as the publisher and printer are presumably the same.[6] Neither the affidavit nor its record are necessary to the validity

1 Dover *v.* Kennerly, 38 Mo. 469; Gardner *v.* Armstrong, 31 Mo. 535.

2 Mayer *v.* Adrian, 77 N. C. 83.

3 G. S. c. 140, § 42.

4 Field *v.* Gooding, 106 Mass. 310; Learned *v.* Foster, 117 Mass. 365; Burns *v.* Thayer, 115 Mass. 89.

5 Burns *v.* Thayer, 115 Mass. 89.

6 Menard *v.* Crowe, 20 Minn. 448; Bunce *v.* Reed, 16 Barb. 347; Sharp *v.* Daugney, 33 Cal. 513.

of the purchaser's title. If the affidavit omits to state that the notice was published once in each week, and the paper in which it was published is erroneously stated, the fact that the notice was properly published may be otherwise proved.[1] And if there be no affidavit at all, the publication of the notices and the circumstances of the sale may be proved by common law evidence.[2]

In New York it is also held that the affidavits of publication and affixing notice of sale are sufficient to pass the title without being recorded.[3]

If the provisions of a power of sale be not strictly complied with no title passes; and therefore if it provide that an affidavit of the proceedings under the power should be recorded in a certain county within one year, and the affidavit be not made and filed within such time, the sale will be treated as a nullity.[4]

1905. In order that the affidavit may have the force of presumptive evidence of the facts therein stated, it should be made within a reasonable time after the sale. If made seven or eight years after the sale, it is not such evidence.[5] To have the effect of presumptive evidence, moreover, the affidavit must show that the requirements of law in regard to the sale have been complied with; as, for instance, that service of notice has been made in the manner prescribed.[6] Even when the affidavits are presumptive evidence of the facts required to be stated in them, they may be controverted by the mortgagor, or those claiming under him.[7] Where the affidavits may be filed at any time, it would seem that defects in the original affidavits may be corrected by new affidavits.[8] But defects in the affidavits cannot be supplied after the commencement of an action in which they are material for the support of the title. The parties must stand on the affidavits as they were at the time of bringing the suit.[9]

[1] Golcher *v.* Brisbin, 20 Minn. 453.

[2] Arnot *v.* McClure, 4 Den. (N. Y.) 41.

[3] Tuthill *v.* Tracy, 31 N. Y. 157; Howard *v.* Hatch, 29 Barb. (N. Y.) 297; Frink *v.* Thompson, 4 Lans. (N. Y.) 489. See Mowry *v.* Sanborn, 68 N. Y. 153, where the history of the legislation on this subject is given.

[4] Smith *v.* Provin, 4 Allen (Mass.), 516.

[5] Mundy *v.* Monroe, 1 Mich. 68.

[6] Mowry *v.* Sanborn, 65 N. Y. 581. An affidavit on information and belief is insufficient. But see S. C. 11 Hun, 545.

[7] Arnot *v.* McClure, 4 Den. (N. Y.) 41; Sherman *v.* Willett, 42 N. Y. 146; Mowry *v.* Sanborn, 62 Barb. (N. Y.) 223; 7 Hun, 380; 68 N. Y. 153.

[8] Bunce *v.* Reed, 16 Barb. (N. Y.) 347.

[9] Dwight *v.* Phillips, 48 Barb. (N. Y.) 116; Mowry *v.* Sanborn, 7 Hun (N. Y.), 380; but see S. C. 62 Barb. 223; 65 N. Y. 581; 11 Hun, 545; 68 N. Y. 153.

In the last report it was declared that

The mortgagee is accountable for the full amount bid at the sale if he completes it by a conveyance, whether he actually receives the purchase money or not. His affidavit need not state the rendering of an account or the disposition that has been made of the purchase money.[1] Where the whole estate is sold, the purchase money is properly applicable to the payment of any prior incumbrances upon the property as well as the mortgage under which the sale is made, so far as it will go; and it is only in case the consideration of the sale exceeds the amount of such incumbrances that he is accountable for a surplus. A second or subsequent mortgagee is not estopped by the recital in his affidavit of sale of the amount for which the sale was made, to show that the sale was in fact of the whole estate, and that less than the whole amount of the incumbrances was received.[2]

14. *Setting aside and waiving Sale.*

1906. A mortgagee or trustee in the exercise of a power of sale must act fairly, and is under very much the same obligation to other parties in interest as trustee, in other cases. "I apprehend," says Vice-Chancellor Bruce,[3] "that a mortgagee having a power of sale cannot, as between him and the mortgagor, exercise it in a manner merely arbitrary, but is, as between them, bound to exercise some discretion; not to throw away the property, but to act in a prudent and business like manner, with a view to obtain as large a price as may fairly and reasonably, with due diligence and attention, be under the circumstances obtainable." So far as other persons are interested in the property the power is regarded as a trust, and the mortgagee is treated as a trustee in the exercise of it. Fairness and good faith are demanded of him.[4] The grounds for setting aside a sale under a power are not merely those which are recognized as sufficient for

defects in an affidavit of service of notice upon the mortgagor might be supplied by parol evidence.

[1] Childs *v.* Dolan, 5 Allen (Mass.), 319.

[2] Alden *v.* Wilkins, 117 Mass. 216.

[3] Matthie *v.* Edwards, 2 Coll. 465, 480. This statement of a general principle is undoubtedly correct, though in the application of it to the case in hand the Vice-Chancellor was subsequently overruled in Jones *v.* Matthie, 11 Jur. 504. In Orme *v.* Wright, 3 Jur. 19, Lord Langdale said: "A trustee should use all the means in his power to get the fairest and best price for the property."

[4] Ellsworth *v.* Lockwood, 42 N. Y. 89; Jencks *v.* Alexander, 11 Paige (N. Y.), 624. See Soule *v.* Ludlow, 3 Hun (N. Y.), 503; 6 T. & C. 24; Longwith *v.* Butler, 8 Ill. 32; Weld *v.* Rees, 48 Ill. 428, 437; Waller *v.* Arnold, 71 Ill. 350; Grover *v.* Fox, 36 Mich. 461.

setting aside a foreclosure sale made under proceedings in equity ;[1] but there are also others which arose from the trust relation, in which the mortgagee acts in conducting the proceedings.

The obligations of a mortgagee in the exercise of the power are forcibly declared by Mr. Justice Wells, of Massachusetts: "One who undertakes to execute a power of sale is bound to the observance of good faith and a suitable regard for the interests of his principal. He cannot shelter himself under a bare literal compliance with the conditions imposed by the terms of the power. He must use a reasonable degree of effort and diligence to secure and protect the interests of the party who intrusts him with the power. A stranger to his proceedings, finding them all correct in form, and purchasing in good faith, may not be affected by his unfaithfulness. But whenever his proceedings can be set aside without injustice to innocent third parties, it will be done upon proof that they have been conducted in disregard of the rights of the donor of the power. When a party who is intrusted with a power to sell attempts, also, to become the purchaser, he will be held to the strictest good faith and the utmost diligence for the protection of the rights of his principal." [2]

1907. Whether a sale is void or voidable only by reason of any irregularity depends upon the nature of the irregularity. The distinction is taken that when a power directs the doing of a specified thing in a particular manner, and there has been a total failure to comply with the direction, the execution of the power is void. Thus a sale without publication of notice in certain newspapers specified in the power was held void.[3] But when the mode and manner of the notice of sale, or of the place of it, is left to the discretion of the trustee, and it appears that there has been an honest though mistaken exercise of his judgment in respect to these matters, the sale is not regarded as absolutely void, but is voidable only at the election of the parties interested.[4]

1908. When the owner of the equity of redemption becomes bankrupt, and foreclosure proceedings are subsequently instituted in a state court against the objection of the assignee,

[1] See Leet *v.* McMaster, 51 Barb. (N. Y.) 236; Hubbell *v.* Sibley, 5 Lans. (N. Y.) 51.

[2] Montague *v.* Dawes, 14 Allen (Mass.), 369. And see Hood *v.* Adams, 124 Mass. 481.

[3] Bigler *v.* Waller, 14 Wall. 297.

[4] Ingle *v.* Culbertson, 43 Iowa, 265, 273.

or an attempt is made to foreclose by a sale under a power, the proceedings are void unless made with leave of the bankrupt court.[1] But the fact that a subsequent mortgagee is a bankrupt is no objection to the execution of a power of sale in a prior mortgage.[2]

1909. Allowing property to be sacrificed. — A mortgagee with power to sell, or holding under an absolute conveyance, must sell fairly and for the best price he can obtain. He has no right to sell for a price sufficient to pay his claim without reference to the value of the property. A purchaser who knows that the mortgagee is sacrificing the property for a small fraction of its value is not an innocent purchaser, and will only occupy the position of an assignee of the mortgage debt.[3] If a trustee permits property to be sacrificed by a sale for a small fraction of its value, as where property worth from $5,000 to $8,000 is sold for $1,000, the sale will be set aside on timely application.[4]

But where property sells for two thirds of its value, and the sale is unattended by fraud, the inadequacy of price does not authorize the setting aside of the sale.[5]

When the notices provided for by the power have been properly given, and there is no fact underlying the formal proceedings showing bad faith on the part of the mortgagee, the mortgagor cannot have relief from the sale, although through his own mistake or negligence he failed to attend the sale or to protect his interest. A court of equity will not open a sale for any such reason.[6]

1910. The sale is avoided by a secret arrangement to prevent competition. Every person interested in the equity of redemption has a right to claim that the sale shall be made fairly and with the advantage of such competition as the sale would ordinarily command. A secret arrangement between the mortgagee and a person interested in buying the property, whereby

[1] Hutchings *v.* Muzzy Iron Works, 6 Chicago Leg. News, 27; *In re* Brinkman, 7 Bank. Reg. 421. §§ 1231–1236.

[2] Long *v.* Rogers, 6 Biss. 416.

[3] Runkle *v.* Gaylord, 1 Nev. 123. In this case the price obtained was about a third of the value of the estate, and five months' rent of it was sufficient to pay the debt.

[4] Vail *v.* Jacobs, 62 Mo. 130, per Sherwood, J. "Neither the law nor the parties intend that the trustee shall be a nose of wax, a mere figure-head, in the hands of the creditor and of the auctioneer." And see Meath *v.* Porter, 9 Heisk. (Tenn.) 224.

[5] Weld *v.* Rees, 48 Ill. 428.

[6] King *v.* Bronson, 122 Mass. 122; Weld *v.* Rees, 48 Ill. 428.

competition is prevented, avoids the sale. On this ground a person claiming under the mortgagor was allowed to redeem after a sale made while an injunction against it was in force, under an arrangement between the mortgagor and the person who procured the injunction that the sale should be made, and that he should bid off the property at a certain price, and the injunction suit should be dismissed.[1] A sale was held fraudulent and void where the assignee of the mortgage acting as auctioneer, seeing the owner of the equity approaching, immediately knocked down the property to his own brother in order to prevent competition.[2]

If an agent of the mortgagee acting under the power in making the sale has previously agreed with the purchaser to furnish half of the purchase money and divide the profits, the sale is a fraud upon both the mortgagor and mortgagee.[3]

The burden of proof is upon the party charging fraud and collusion between the buyer and the seller under a power.[4]

1911. Any fraud or deception practised upon the owner of the mortgaged premises, in consequence of which he has lost his rights, is sufficient ground for setting aside the sale.[5] The power of sale in a mortgage is a trust power, so far as it relates to the interest in the property, or in the proceeds of it above the amount due the mortgagee; and any collusive arrangement between the mortgagee and a third person, so to execute the power as to deprive the owner of the equity of redemption of his rights by keeping the knowledge of the sale from him, or by preventing a fair competition at the sale and enabling a purchaser to obtain the premises at a price below their value, will avoid the sale.[6]

If the owner of the land be insane, and the mortgagee knowing the fact buys the property for less than half its value, the sale should be set aside as fraudulent and void; and a purchaser from the mortgagee having the same knowledge has no better right to hold the property than the mortgagee himself.[7]

[1] See Mapps *v.* Sharpe, 32 Ill. 13.

[2] Jackson *v.* Crafts, 18 Johns. (N. Y.) 110.

[3] Mann *v.* Best, 62 Mo. 491.

[4] Bush *v.* Sherman, 80 Ill. 160; Munn *v.* Burges, 70 Ill. 604.

[5] Banta *v.* Maxwell, 12 How. (N. Y.) Pr. 479; Murdock *v.* Empie, 19 Ib. 79. See, also, Ferrand *v.* Clay, 1 Jur. 165; Soule *v.* Ludlow, 6 Thomp. & C. (N. Y.) 24; 3 Hun, 503; Lee *v.* McMaster, 51 Barb. (N. Y.) 236.

[6] Jencks *v.* Alexander, 11 Paige (N. Y.), 619. In this case, Walworth, Chancellor, said: "It is impossible to wink so hard as not to see that the power of sale was executed in bad faith." Howard *v.* Ames, 3 Met. (Mass.) 308.

[7] Encking *v.* Simmons, 28 Wis. 272.

A sale under a power was set aside where the mortgagee filed a bill in equity to foreclose making a junior mortgagee a party defendant, and pending this suit, to which the junior mortgagee answered, the first mortgagee sold under the power of sale. The resort to equity to foreclose the mortgage had a tendency to lull the junior mortgagee into a false security in regard to any sale under the power.[1]

The fact that one of two joint mortgagors, upon the refusal of the other to pay part of an instalment due, refuses to pay his part, and suggests a sale under the power, is no evidence of his fraudulently procuring a foreclosure of the mortgage.[2]

1912. The conduct of the purchaser at the sale may avoid it;[3] as where he expostulates with a rival bidder, informing him of his losses, and telling him that on account of them he ought not to bid against him, and thereby causes the bidder to withdraw, and obtains the land at a price much less than its value, the sale will be invalid as against a subsequent mortgagee who seeks to redeem.[4] A combination by the purchaser with other bidders at the sale, for the purpose of obtaining the property at a price below its value, will also invalidate the sale.[5]

1913. If a purchaser buys at a sale under a power with knowledge of circumstances sufficient to invalidate the sale, as that a valid tender has been made of the whole amount due under the mortgage, he thereby becomes a party to the transaction, and is not protected by a proviso that the purchaser need make no inquiries. Such knowledge puts him in the same situation as the mortgagee as to the validity of the sale.[6] He is chargeable with notice of defects and irregularities attending the sale. He is chargeable too with knowledge whether proper notice of the sale was given, and whether the sale was made at the time and in the manner required by the power.[7] But the rule is different as regards remote purchasers, who, having no notice in fact of any irregularities, will be protected as innocent purchasers.[8]

1914. Purchase by agent without authority. — A trustee, in whose name a mortgage was taken to secure the payment of the

[1] Hurd *v.* Case, 32 Ill. 45.

[2] St. Joseph Manufacturing Co. *v.* Daggett, 84 Ill. 556.

[3] Sugden on Vendors, 30.

[4] Fenner *v.* Tucker, 6 R. I. 551.

[5] Dover *v.* Kennerly, 44 Mo. 145, 148.

[6] Jenkins *v.* Jones, 2 Gif. 99. See Cranston *v.* Crane, 97 Mass. 459; Chicago, Rock Island, &c. R. R. Co. *v.* Kennedy, 70 Ill. 350.

[7] Gunnell *v.* Cockerill, 79 Ill. 79.

[8] Gunnell *v.* Cockerill, *supra*.

separate claims of several creditors of the mortgagor, has no authority to bind them by a purchase of the property at the foreclosure sale, made in good faith and for the protection and joint benefit of all of them; neither can a majority of such creditors force the others, who object to the purchase, to enter into any arrangement for buying the lands at such sale. A resale of the property will be ordered at the option of the objecting creditors.[1]

1915. Mere inadequacy of price is no ground for vacating a sale if it was fairly conducted in every respect.[2] And even in a state where the sale must be reported to the court and confirmed, as in case of a foreclosure sale in equity, the inadequacy of price must be very material to prevent a confirmation of it; and such in fact as to furnish evidence of fraud on the part of the trustee. This circumstance, however, when taken in connection with others attending the sale, may be considered sufficient in the sound discretion of the court to call for its equitable interposition and the setting aside of the sale.[3] A sale of property, worth at least $8,500 for $5,000, was not regarded such a gross inadequacy of price as to authorize equitable interference; but when it appeared further that the sale was made at an unusual hour, and that only two bidders were present, the sale was set aside, although it was not shown that the property would have brought any greater sum had it been sold at the usual hour of sale.[4]

The owner of land sold under a power of sale, who attends the sale and bids upon the property, and allows it to be sold to another, will not be permitted years afterwards, when improvements have been made upon it, to impeach the sale on account of inadequacy of price.[5]

A sale by a trustee under a trust deed will not be set aside because the premises were sold for only one third their value, the purchaser being a stranger to the transaction, and having in good faith sold the premises to another; nor because the property was sold in parcels and not together; nor because the trustee should have adjourned the sale in view of the small attendance and inadequate price bid.[6] Objection to the validity of the sale comes

[1] Bradley *v.* Tyson, 33 Mich. 337.

[2] King *v.* Bronson, 122 Mass. 122; Wing *v.* Hayford, 124 Mass. 249; Landrum *v.* Union Bank of Mo. 63 Mo. 48; Harnickell *v.* Orndorff, 35 Md. 341; Horsey *v.* Hough, 38 Md. 130. See § 1670.

[3] Hubbard *v.* Jarrell, 23 Md. 66.

[4] Stoffel *v.* Schroeder, 62 Mo. 147.

[5] Watson *v.* Sherman, 84 Ill. 263.

[6] Shine *v.* Hill, 23 Iowa, 264.

too late when third persons, acting in good faith, have acquired rights.[1]

Where by statute a time is allowed for redemption under a sale, mere inadequacy of price does not vitiate the sale, because the owner of the equity of redemption cannot be prejudiced, inasmuch as he may always redeem within such time by refunding the amount paid with interest according to the statute. It is only his failure to do this that can occasion him any loss.[2]

1916. Sale waived by extending time of redemption. — If a mortgagee who has purchased the premises at a foreclosure sale during the year allowed for redemption agrees with the mortgagor to extend the time of payment beyond the year, and in accordance with the agreement accepts money from the mortgagor, the sale is thereby rendered ineffectual; and the mortgagee cannot afterwards rely upon the sale and record the sheriff's deed as being of any force.[3] But if part payments are made and received after the sale, with the understanding that the whole sum necessary for that purpose is to be paid within the year allowed by statute, they do not avoid the sale but are in affirmance of it.[4]

A foreclosure may be opened when the purchaser has agreed with the mortgagor to allow him to redeem the estate after a sale under the power; or a specific performance of the agreement may be decreed.[5]

1917. A promise to allow the mortgagee to repurchase does not waive the sale. A casual remark by a purchaser under a deed of trust, who was also the beneficiary under it, and connected with the family of the maker of it, that he only wished by the purchase to secure his debt, and when that was paid he intended to reconvey the property, does not open the sale or make the purchaser a trustee of the property.[6] Nor would the promise of a mortgagee, made at the time of his purchase at his own sale under the power, that he would allow the mortgagor to repurchase, without other evidence of such intention, remit them to their former relation, so that the mortgagor could redeem after waiting several years; but the mortgagee's refusal to allow such redemption within a reasonable time might be evidence of such fraud in the

[1] Shine *v.* Hill, 23 Iowa, 264.
[2] Cameron *v.* Adams, 31 Mich. 426.
[3] Dodge *v.* Brewer, 31 Mich. 227.
[4] Cameron *v.* Adams, 31 Mich. 526.
[5] Orme *v.* Wright, 3 Jur. 19; Lockwood *v.* Mitchell, 7 Ohio St. 387.
[6] Mansur *v.* Willard, 57 Mo. 347.

purchase by the mortgagee as to admit the mortgagor to his right of redemption.[1]

1918. A suit for a second instalment does not open foreclosure. When a mortgage is foreclosed for an instalment due, and a subsequent suit is brought to recover a second instalment, such suit does not open the foreclosure. In this case the foreclosure was made by taking possession of the premises instead of selling them; and the mortgagor is entitled to a credit on the debt of the value of the mortgaged property.[2]

1919. Not waived by subsequent entry to foreclose. — A foreclosure sale under a power, voidable by reason of the mortgagee's becoming the purchaser, is not waived or opened by the mortgagee's subsequently entering in the presence of two witnesses, in accordance with the statute, for the purpose of foreclosure, provided there be no evidence showing an intention to waive or abandon the rights acquired by the sale.[3]

1920. Waiver by agreement. — After an ineffectual attempt to foreclose under a power of sale, if the purchaser waives his rights the mortgagee may also waive the sale, and proceed anew to foreclose under the power or by suit in equity.[4] But if the sale be regular and complete in all respects, it would seem that the mortgagor might insist upon its standing. At any rate when the sale is for a sum sufficient to pay the mortgage debt and expenses, although the mortgagee be himself the purchaser at the sale, he cannot, by refusing to execute the deed, rescind the sale, and maintain an action upon the mortgage note.[5] He is bound as a trustee to execute the trust with a due regard to the interests of the mortgagor, or others having any interest in the property, or liable for the mortgage debt. Having himself become the purchaser, he is bound to carry out and complete his purchase to the same extent as any other purchaser. The proper performance of his duty as purchaser is as imperative upon him as the proper performance of his duty as seller. The fact that he unites the two characters in his own person cannot give him any additional rights; on the contrary, he is held to a stricter accountability when he undertakes to buy.[6]

[1] Medsker *v.* Swaney, 45 Mo. 273.
[2] Wilson *v.* Wilson, 4 Iowa, 309.
[3] Learned *v.* Foster, 117 Mass. 365.
[4] See § 1265; Atwater *v.* Kinman, Har. Ch. (Mich.) 243.
[5] Hood *v.* Adams, 124 Mass. 481.
[6] Per Endicott, J., in Hood *v.* Adams, *supra*.

1921. Relief by setting aside the sale must be sought in equity. The purchaser at the sale and all persons claiming under him are necessary parties.[1] If the sale has not been completed by the payment of the purchase money the mortgagee should be made a party. After the completion of the sale by a conveyance from the mortgagee to the purchaser, the latter will as assignee hold the rights of the mortgagee even if the sale be set aside.[2] The setting aside of the sale does not affect or impair the original mortgage lien.[3] If one who has received any part of the surplus money brings an action to set aside the sale, he will be required to refund the money he has received before the sale will be disturbed.[4]

The remedy of one who, having an interest in the equity of redemption, wishes to test the validity of a sale under a power, is by a bill to redeem, and not by a bill to set aside the sale and have the property resold; and this is the remedy, although it be shown that the mortgagee has used his power of sale inequitably, and has unfairly bought in the property himself.[5] If the foreclosure sale be void for any irregularity, the right of redemption remains unchanged in the mortgagor.[6]

1922. Delay. — Where no steps had been taken to redeem a mortgage for nearly forty years after its maturity, and more than thirty years after an open attempt to foreclose it, it was said that it would require a very strong showing to authorize a redemption.[7] So a delay of four years precludes a mortgagor's redeeming as against subsequent purchasers.[8] Acquiescence for any considerable time in a sale which is voidable only, unless explained, is deemed a waiver of all mere irregularities attending it; and ignorance of the facts which are claimed as vitiating the sale is not a sufficient explanation of such acquiescence, when such ignorance is the fault or negligence of the party.[9]

Moreover if the mortgagor receives the surplus money, although

[1] Candee *v.* Burke, 1 Hun (N. Y.), 546; 4 T. & C. 143; Fairman *v.* Peck, 87 Ill. 156.

[2] Robinson *v.* Ryan, 25 N. Y. 320; Jackson *v.* Bowen, 7 Cow. (N. Y.) 13; Vroom *v.* Ditmas, 4 Paige (N. Y.), 526.

[3] Stackpole *v.* Robbins, 47 Barb. (N. Y.) 212.

[4] Candee *v.* Burke, *supra.*

[5] Schwarz *v.* Sears, Walk. (Mich.) 170.

[6] Goldsmith *v.* Osborne, 1 Edw. Ch. (N. Y.) 560.

[7] Hoffman *v.* Harrington, 33 Mich. 392. See § 1674.

[8] Hamilton *v.* Lubukee, 51 Ill. 415.

[9] Bush *v.* Sherman, 80 Ill. 160; Farrar *v.* Payne, 73 Ill. 82; Watson *v.* Sherman, 84 Ill. 263; Landrum *v.* Union Bank of Mo. 63 Mo. 48.

he may not be estopped from questioning the validity of the sale, it is a matter to be considered in passing upon the validity of it; and he would be required to refund the amount received before his application could in any case be granted.[1]

15. *Costs and Expenses.*

1923. Mortgagee not entitled to compensation. — A mortgagee with a power of sale is treated as a trustee for sale, and the general rule applicable to trustees, that they shall not profit by the trust, excludes him from claiming compensation for his services in the execution of his power of sale. He is to consider not only his obligation to the purchaser, but his liability to his *cestui que trust* or mortgagor.[2] The same rule applies to a trustee in a trust deed. But the mortgage or trust deed may provide for compensation to the mortgagee or trustee, and then the agreement of the parties will, of course, govern. A provision is frequently inserted in mortgages, allowing the mortgagee on a sale to charge a commission for his services; and in such case it would seem that a charge of the stipulated commission would be allowed in addition to the ordinary expenses and counsel fees.[3] But the mortgagee may charge and be allowed for all proper expenses incurred in the execution of the power of sale, whether the mortgage expressly provide for the payment of such expenses or not. He may charge for expenses of advertising, for auctioneers' fees, and for counsel fees for advice as to the proper execution of the power.[4] Such expenses are properly chargeable under the mortgage, though the attempted sale be discontinued and the property sold in some other way, especially if such sale be discontinued at the request of the debtor or in his interest.[5]

In Maryland, where the power of sale is executed under the direction of the court, the trustee for sale is allowed a commission of five per cent. But in a case where the owner of the equity of

[1] Candee *v.* Burke, 1 Hun (N. Y.), 546; 4 Thomp. & C. 143; Joyner *v.* Farmer, 78 N. C. 196.

[2] Sugden on Vendors, 55; Allen *v.* Robbins, 7 R. I. 33.

[3] Lime Rock Bank *v.* Phetteplace, 8 R. I. 56.

In this case a commission of five per cent. on the gross proceeds of sale, as stipulated in the mortgage, was allowed in addition to the expenses and counsel fees paid. It was contended that this commission was in the nature of a penalty which the court should relieve against; but it was allowed as compensation to the mortgagee. See § 1606.

[4] Allen *v.* Robbins, 7 R. I. 33.

[5] Allen *v.* Robbins, *supra*.

redemption requested an adjournment of the sale, and agreed to pay the usual commissions for sale and the expenses of the adjournment, a claim for commissions in addition to those for the actual sale was disallowed, though the expenses of the ineffectual sale were allowed.[1]

The mere fact that one is named as trustee in a deed of trust raises no implied promise on the part of the beneficiary to pay him for his services.[2]

1924. Reasonable expenses incurred in advertising a sale under a power are always allowed; but when a sale has been enjoined after it was advertised, and the mortgagee or trustee, in anticipation of the action of the court, incurs expense in advertising an adjournment, he is not entitled to have this allowed to him on the dissolution of the injunction; but reasonable attorney's fees for preparing the advertisement may be allowed.[3] If the person who obtains an injunction against a sale allows the advertisement to continue, he is chargeable with the whole expense of the publication.[4] The expenses of an abortive sale must generally be borne by the mortgagor.[5]

1925. If the power provides that the mortgagee may retain all costs and expenses of sale, he may retain a reasonable sum for legal advice respecting it, and also for his own time and trouble.[6] If, however, the sale is not completed, but the advertisement, being imperfect, is withdrawn after a single publication, no attorney's fees or costs can be collected. A tender of the full amount of the debt is good.[7] If after a defective foreclosure the mortgagee for any purpose of his own deems it important to proceed to a new foreclosure for the correction of an error in his own

[1] Neptune Ins. Co. *v.* Dorsey, 3 Md. Ch. 334.

[2] Catlin *v.* Glover, 4 Tex. 151.

[3] Marsh *v.* Morton, 75 Ill. 621.

In this case the trustee advertised sales under nine trust deeds securing debts to the amount of $50,000, and $150 was allowed for preparing them.

[4] Collins *v.* Standish, 6 How. (N. Y.) Pr. 493. See opinion of Harris, J., in this case for a bill of costs, such as is properly allowable in New York.

[5] Sutton *v.* Rawlings, 18 L. J. (N. S.) Exch. 249; S. C. 3 Exch. 407; Neptune Ins. Co. *v.* Dorsey, 3 Md. Ch. 334. See § 1607.

[6] Varnum *v.* Meserve, 8 Allen (Mass.), 158.

In this case the judge of the Superior Court found to be reasonable in amount a charge of thirty dollars for legal advice and making the deed, and another of twenty dollars for the mortgagee's own time and trouble in relation to the sale.

[7] Collar *v.* Harrison, 30 Mich. 66.

proceedings, he can neither legally nor equitably charge his mortgagor with the expense.[1]

1926. When the bankruptcy court orders the mortgaged property to be sold, and the mortgage debt to be paid out of the proceeds, with leave to the mortgagee to buy at the sale, the costs and expenses are properly payable out of the proceeds of the sale, although these are not sufficient to satisfy the debt, rather than out of the other assets of the bankrupt estate. Such costs do not pertain to the general administration of the bankrupt's estate, but result from the enforcement of a specific lien in large part for the benefit of the mortgagee, the proceeding being substantially one mode of foreclosing the mortgage.[2]

16. *The Surplus.*

1927. Generally the mortgage with a power of sale provides for the disposal of the surplus. Different terms are used for this purpose; and they should conform to the disposal that the law would make irrespective of the provision itself;[3] though if this provision be imperfect in not meeting the circumstances of any particular case, or if the direction be different from the disposal that would be made of the surplus under general principles of law, the direction in the deed must yield to the equitable rights of the persons interested. This provision may be very short and comprehensive; and in the best forms of conveyances it is simply that the surplus shall go to the mortgagor, his heirs and assigns.[4] A direction that it be paid to the executors or administrators of the mortgagor is objectionable, because if the sale takes place after the death of the mortgagor, the land has already passed to his heirs or devisees, and the surplus then belongs to them, notwithstanding such direction; the mortgage cannot alter the character of the surplus as between the personal representatives of the mortgagor and his real representatives. Objection has also been made to the direction that the surplus shall be payable to the mortgagor, his heirs or assigns; because if the sale should be made in his lifetime, but his death should occur before the pay-

[1] Clark *v.* Stilson, 36 Mich. 482.

[2] *In re* Ellerhorst, 2 Sawyer, 219.

The mortgagee in this case had previously offered to take the property in satisfaction of the debt, but the assignee declined the proposition in the hope of realizing more.

[3] See Forms of Mortgages, § 60.

[4] Wright *v.* Rose, 2 Sim. & St. 323; Bourne *v.* Bourne, 2 Hare, 35; *In re* Smith, 7 Jur. (N. S.) 903.

ment of the surplus, this would then go to his personal representatives, because the land had been converted into personalty at the time of his death. This form is also open to the objection of not being strictly correct in the case of a sale made after the death of the mortgagor, when he has by his will directed his executor to convert his real estate into personalty. The terms of the mortgage in these cases would have to yield to these circumstances under which they do not meet the equities of the parties. Although the direction that the surplus shall be paid to the mortgagor, his heirs or assigns, does not fully meet these exceptional cases, no harm can come from this, because the surplus is in all cases bound by the actual rights and equities of the parties interested. No form of words can be used which will in every case fully point out to the mortgagee the persons to whom he is to pay the surplus; and that form which is correct generally, and is the most concise, is the best.[1] The mortgagee cannot be relieved of the responsibility of determining who are the persons entitled according to law, unless in cases of doubt he refers the determination of this question to the courts. Complications may arise which may make such a reference the only safe course; but usually there is no difficulty in determining who are entitled under the law, and the direction to pay to the heirs or assigns of the mortgagor affords as much aid as any other, however elaborate.

1928. If the surplus in the hands of the mortgagee remains unproductive while adverse claims are made upon him by different persons, he is not chargeable with interest pending the determination of their rights.[2] It may happen that on account of adverse claims, or on account of the absence or death of the mortgagor or other person entitled to the surplus, that much time may elapse before payment of the surplus can be made, in which case it is advisable either to pay the money into court, or to safely invest it as a trust fund pending the settlement of the question to whom it shall be paid, or the appearance of the rightful claimant.

1929. The surplus proceeds must be applied according to the title of the respective parties in the property itself. If the

[1] The statutory power of sale in England directs the payment of the surplus to the mortgagor, his heirs, executors, administrators, or assigns, according to their respective rights and interests therein.

[2] Mathison *v.* Clark, 25 L. J. (Ch.) N. S. 29; 4 W. R. 30.

sale be under the first mortgage the holders of the second mortgage are first entitled, and then the next subsequent mortgagees in their order, and last, the mortgagor or owner of the equity of redemption. The purchaser of the equity of redemption stands in place of the mortgagor in respect to this right.[1] But the consent of a second mortgagee, that the surplus arising from a sale under the first mortgage may be paid to a purchaser of the equity of redemption, will not authorize such payment as against the mortgagor, without discharging the debt secured by the second mortgage; because the mortgagor is entitled to have the mortgage debts on which he is personally liable satisfied before anything is paid over to one who purchased only the equity to redeem both mortgages.[2]

The right of the surplus passes to the grantee of the mortgagor by a conveyance of the equity of redemption,[3] or by a mortgage of it. But if the lien of a subsequent mortgagee is not affected by the sale, by reason of any irregularity in it, such as a want of notice to him of the proceeding, when this was required by the power or by statute, he has no claim upon the surplus. His claim is in such case upon the land.[4]

1930. Notice of claims to the surplus money must be given to the mortgagee, or he must have actual notice of the incumbrances on which such claims may be founded, or he will not be responsible for not applying the surplus towards the payment of them.[5]

1931. A surplus arising on the sale of real estate under a power after the death of the mortgagor belongs, under the rule in England,[6] adopted also in New York,[7] and other states,[8] to his

[1] § **1688**; Cook *v.* Basley, 123 Mass. 396; Buttrick *v.* Wentworth, 6 Allen (Mass.), 79; Foster *v.* Potter, 37 Mo. 534; Reid *v.* Mullins, 43 Mo. 306; Ballinger *v.* Bourland, 87 Ill. 513.

[2] Andrews *v.* Fiske, 101 Mass. 422.

[3] Buttrick *v.* Wentworth, 6 Allen (Mass.), 79.

[4] Winslow *v.* McCall, 32 Barb. (N. Y.) 241.

[5] M'Lean *v.* Lafayette Bank, 4 McLean, 430.

[6] See § **1695**; Wright *v.* Rose, 2 Sim. & Stu. 323. "If the estate had been sold by the mortgagee in the lifetime of the mortgagor, then the surplus moneys would have been personal estate of the mortgagor, and the plaintiffs would have been entitled. But the estate being unsold at the death of the mortgagor, the equity of redemption descended to his heir, and he is now entitled to the surplus produce." Per the Vice-Chancellor. See, also, Polley *v.* Seymour, 2 Yo. & Coll. 721; Bourne *v.* Bourne, 2 Hare, 35, 39.

[7] Dunning *v.* Ocean Nat. Bank, 61 N. Y. 497; Sweezy *v.* Thayer, 1 Duer (N. Y.) 286.

[8] Chaffee *v.* Franklin, 11 R. I. 578; Shaw *v.* Hoadley, 8 Blackf. (Ind.) 165.

heirs or devisees, and not to his administrator, who cannot maintain an action to recover it, although the mortgage itself provides that the surplus shall be paid to the mortgagor, his executor, or administrator. The heirs or devisees are also entitled to the profits of the surplus in the mortgagee's hands until legal measures be taken by the administrator of the estate to apply the surplus to the payment of the debts of the mortgagor.[1] In support of this view, it is urged that the provision in the mortgage for the payment of the surplus should be construed that the payment is to be made to the executor or administrator whenever it might have been collected by the mortgagor, as for example when the land is sold in his lifetime. Moreover, it is to be observed that in New York the equity of redemption is the legal estate, and the mortgage only a lien.

In Massachusetts, on the other hand, it is held that the action in such case should be maintained by the administrator, who will, however, hold the money when collected in trust for the persons who would have been entitled to the land if no sale had been made.[2] All the cases recognize the doctrine, that the surplus is equitable real estate, and should go to the persons who would be entitled to the equity of redemption. They differ as to the mode in which the parties in interest shall obtain their rights, rather than as to the rights themselves. One reason why the administrator should be entitled to recover is, that if the equity of redemption had not been sold it would have remained subject to the debts of the deceased, and might have been sold under a license to the administrator, if required for that purpose; and therefore the administrator should take the surplus and hold it until it is certain that it will not be required for the payment of debts. Moreover, there is force in the fact that the right of the mortgagor's personal representative to recover is direct under the contract.

1932. In case of the insolvency or bankruptcy of the mortgagor, a provision that the surplus, after satisfying the debt,

[1] Allen *v.* Allen (R. I. 1879), Index to Decisions, J, 102.

[2] Varnum *v.* Meserve, 8 Allen (Mass.), 158. The surplus in such case belongs to the executor, although the mortgagor by will devised the land to others; and he will hold such surplus, first, to the use of the widow having a paramount right of homestead; second, for the payment of debts; and third, to the uses of the will.

In **Michigan** it is held that the surplus is personal estate, and consequently that the personal representatives of the owner of the equity should be made parties to a petition for the surplus. Smith *v.* Smith, 13 Mich. 258.

shall be paid to the mortgagor without naming his assigns, does not create any trust for his benefit, but the surplus will go to his assignee in bankruptcy.[1]

When a mortgage is foreclosed after the death of the mortgagor, and his estate is insolvent, the mortgagee cannot retain a surplus in his hands and apply it to the payment of a simple contract debt due him from the mortgagor, as this would give him a preference over other creditors, but he must hand it over to the personal representatives of the deceased. The mortgagee is merely a trustee of the surplus.[2]

1933. Dower in surplus. — By the foreclosure sale the mortgagor's right of redemption is converted into a claim upon the surplus money in the mortgagee's hands. It is personalty, and belongs to those who are entitled to his personal estate. The wife of the owner of the estate, subject to a mortgage valid against her, has no claim to any part of the surplus proceeds of a foreclosure sale under the mortgage, as against her husband or his assignees in bankruptcy.[3] The sale is as effectual in barring all claim or possibility of dower in the property, as if the foreclosure had been by entry for breach of condition and lapse of time. The death of the husband after the sale, but before the distribution of the money, would not avail to endow the widow of the surplus, as the rights of all parties are fixed at the time of the sale. If the sale take place after the death of the mortgagor, then his widow is entitled to dower in the surplus.[4]

Some courts have held that if there be a surplus after a foreclosure sale, the wife's inchoate right of dower will be protected either by investing one third of the amount to await the perfection or cessation of such right, or by calculating the present value of her chance of surviving her husband, and paying to her at once such sum.[5] But this is an exceptional holding.

1934. When the equity has been sold under execution or attached.— The mortgage usually provides that the surplus, after payment of the mortgage debt and expenses, shall be paid to the mortgagor or his assigns; and in such case the surplus belongs to

[1] Calloway *v.* People's Bank of Bellefontaine, 54 Ga. 441, 450.

[2] Talbot *v.* Frere, L. R. 9 Ch. D. 568.

[3] §§ 1693, 1694; Newhall *v.* Lynn Five Cents Sav. Bk. 101 Mass. 428.

[4] Chaffee *v.* Franklin, 11 R. I. 578.

[5] § 1694; De Wolf *v.* Murphy, 11 R. I. 630.

the person who is at the time of the sale the owner of the equity of redemption. If the equity of redemption has been sold on execution before a sale of the land under a power in the mortgage, the surplus then belongs to the purchaser at the execution sale, for the sale and conveyance on execution constitute such purchaser the owner of the equity of redemption. But if the equity of redemption be attached, and pending the suit the mortgagee sells under such a power in the mortgage, and judgment and execution follow, and the execution be levied by a sale of the land, the levy is a nullity so far as respects the title to the land; and as respects the surplus in the hands of the mortgagee of the proceeds of the sale under the mortgage, it gives the purchaser no right or title; and he cannot maintain either an action at law for money had and received, or a bill in equity to recover such surplus, if brought or filed more than thirty days after judgment was recovered.[1]

Whether by any form of process at law or in equity brought within the period after judgment during which the attachment continues a lien, the creditor could reach and apply to his claim the surplus in the mortgagee's hands, is a question which was not decided in the case last cited, but was determined in a case which arose in the same court soon afterwards; and it was there decided that when land subject to a mortgage is attached on mesne process, and before judgment is recovered the land is sold under a power of sale in the mortgage, for more than enough to pay the debt and expenses of sale, the attaching creditor may by a bill in equity, brought within thirty days after judgment in the action in which the attachment was made, enforce his lien against the surplus.[2]

If at the time of the sale under a trust deed the property has been sold under a junior judgment, and the title has become absolute in the purchaser by the expiration of the time allowed for redemption, so that he has received a deed of the property, or is entitled to one, he is then entitled to receive the whole of any surplus there may be after discharging the debt secured by the trust deed and the expenses; but if the land has been sold under execution, and the time for redemption has not expired, and the purchaser is not entitled at the time of the sale under the trust

1 Gardner *v.* Barnes, 106 Mass. 505.

2 Wiggin *v.* Heywood, 118 Mass. 514; Judge *v.* Herbert, 124 Mass. 330; De Wolf *v.* Murphy, 11 R. I. 630.

deed to a deed conferring the title upon him, he then has only a lien upon the surplus, and is entitled to only so much of it as will satisfy the amount of his bid and the interest thereon allowed by statute. In the latter case the grantor in the trust deed is entitled to the remainder after satisfying the judgment lien, although his right to redeem has expired, but the purchaser's right has not become absolute by the expiration of the time within which there can be a redemption from him by any one else; as where twelve months are allowed the debtor for redemption, and three months more for redemption by a creditor, and the sale under the trust deed takes place during these three months.[1]

1935. Judgment lien. — The sale cuts off all right of redemption, and prevents any levy of execution upon the land by virtue of the attachment. The land is turned into money, which is to be applied in the first instance to the payment of the debt and expenses of the mortgagee, and any surplus to the same persons the land belonged to before the sale. Their respective rights in the fund are not affected by the sale; and the court will apply the money according to the rights of the parties as they existed before the real estate was turned into money.[2] If there be a judgment lien upon the equity of redemption, this must be satisfied before the owner can claim anything.[3]

1936. Where the payment of a mortgage debt has been charged upon a portion of the mortgaged premises, by reason that the mortgagor has given a warranty deed of the other portion, the charge in equity attaches to the surplus arising from the sale of the land by a prior mortgagee.[4]

If there are sureties upon part of the debt secured by the mortgage, upon a sale of the property the mortgagee becomes a trustee for them to the amount of the funds provided for their indemnity, and must see that their just proportion of the pro-

[1] Hart *v.* Wingate, 83 Ill. 282. A previous judgment in this case under the name of Solt *v.* Wingate, 8 Chicago Legal News, 179; 2 N. Y. Weekly Dig. 98, which was clearly contrary to principle and authority, was withdrawn. In support of the text see, also, Snyder *v.* Stafford, 11 Paige (N. Y.), 71.

[2] Astor *v.* Miller, 2 Paige (N. Y.), 68; Fry's Appeal, 76 Pa. St. 82; Douglass's Appeal, 48 Pa. St. 222; De Wolf *v.* Murphy, 11 R. I. 630; Bartlett *v.* Gale, 4 Paige (N. Y.), 503; Barber *v.* Cary, 11 Barb. (N. Y.) 549.

[3] Eddy *v.* Smith, 13 Wend. (N. Y.) 488; Hall *v.* Gould, 79 Ill. 16. See §§ **1687, 1688.**

[4] Beard *v.* Fitzgerald, 105 Mass. 134.

ceeds is applied to the discharge of the debt upon which they are bound.[1]

1937. When property is sold under a mortgage or deed of trust to satisfy one instalment of the debt before the others have matured, and there is no provision that the whole debt shall be due and payable upon a default upon any part of it, the trustee holds any surplus there may be, after satisfying the expenses and the part of the debt then due, subject to the same lien as the property was.[2] The mortgagor has no claim to it. When the mortgage provides that the whole debt shall become due upon any default, either the mortgagor or his assignee is authorized to exercise the option to declare due all the notes secured by the mortgage, and to advertise and sell the premises in payment of the whole debt.[3] The trustee in a deed of trust has the same right, and is not bound to give any notice to the debtor of his election to treat the whole debt as due.[4]

1938. Payment of whole debt on a sale for an instalment. — It is not necessary, in order to authorize a sale under a power and the payment of the whole debt upon default in the payment of an instalment of the debt, before the whole of it has matured, that there should be an express provision that the whole may in such event become due and be collected.[5] Although it is true that a power to sell the property in the event of any default, and out of the proceeds to retain the principal and interest then due, while it authorizes the sale of the entire property, does not make the entire debt due and collectible upon the first default; yet if

[1] § 1706; Fielder *v.* Varner, 45 Ala. 429.

[2] §§ 1699–1703; Huffard *v.* Gottberg, 54 Mo. 271.

[3] Heath *v.* Hall, 60 Ill. 344.

[4] Princeton Loan & Trust Co. *v.* Munson, 60 Ill. 371.

[5] Olcott *v.* Bynum, 17 Wall. 45.

The power was as follows: "That if default shall be made in the payment of the said sum of money, or the interest that may grow due thereon, or of any part thereof, that then, and upon failure of the grantor to pay the first or any subsequent instalment, as hereinbefore specified, it shall be lawful for the trustee to enter upon all and singular the premises hereby granted, and to sell and dispose of the same, and all benefit and equity of redemption, &c., and to make and deliver to the purchaser or purchasers thereof a good and sufficient deed for the same, in fee simple, and out of the money arising from such sale to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertising and sale of the same premises, rendering the overplus of the purchase money, if any there shall be, unto the said Hovey," the grantor. Mr. Justice Swayne said that the mortgagee in this case having applied the fund as a court of equity would have applied it, there was no ground for complaint.

the property be incapable of division without injury, and is sold upon the first default, and yields a fund sufficient to pay the whole debt, it may be so applied at once, so as to stop interest and extinguish the whole liability.

Generally the power of sale authorizes the mortgagee, upon making a sale, to retain from the proceeds the whole amount of his demand, whether it be due or not. In several states, as in Michigan, Minnesota, New York, and Wisconsin, the statutes regulating sales under powers provide that if the premises consist of distinct parcels or lots, no more shall be sold than is sufficient to satisfy the amount due on the mortgage with interest and costs.[1] When it is proper to sell the whole mortgaged premises together, the whole debt may be retained from the proceeds. These statutes do not contemplate a sale subject to instalments not due at the time of the sale.[2] The powers are never drawn with a view to such a proceeding. In this respect the effect of the sale in the payment of the debt is quite different from that of a foreclosure sale in equity, where provision may be readily made for further sales to meet future instalments, or for the care of the money received in excess of the amounts due, and the payment of the instalments as they mature. Except under the statute there can be no sale of the mortgaged estate to pay the amount already due, subject to the future instalments. The mortgage is extinguished by such sale, though relief might be had in equity against the purchaser.

1939. If a sale is made when only part of the mortgage notes have matured, under a notice of a sale to be made subject to another note specified, the presumption is conclusive that the land sold for the amount of the unpaid notes less than it would otherwise have done. The mortgagor may then insist that payment of such notes shall be made out of the land upon which they have become by the mortgage and sale an express charge. Therefore there can be no action against him for these notes. The fact that the mortgagees became purchasers under the foreclosure sale places them in no better position, in regard to collecting the notes of the mortgagor, than if a third party had purchased subject to the notes. If the mortgagor should be compelled to pay

[1] See Statutes, §§ 1340, 1343, 1351, 1364.

[2] Cox *v.* Wheeler, 7 Paige (N. Y.), 248; Jencks *v.* Alexander, 11 Ib. 619; Bunce *v.* Reed, 16 Barb. (N. Y.) 347; Barber *v.* Cary, 11 Ib. 549.

the note he would be subrogated to the mortgage security, and might proceed to collect the amount of these notes out of the land. To prevent circuity of action, a suit upon the notes against the mortgagor is not allowed.[1]

As already noticed, it is a settled rule of law in several states that where a mortgage or deed of trust has been given to secure the payment of several notes, which become due at different times, the notes have priority of lien, in the order in which they become due and payable.[2] Accordingly, where the first note falling due of a series of notes secured by a trust deed belonged to one party, and the other notes to another, and the trustee, at the request of the holder of the note first due, advertised the property for sale to pay his note, and afterwards, at the request of the holder of the other notes, advertised and sold the property at an earlier day to the latter, and then upon the day of sale under the first advertisement sold the property again to the holder of the first maturing note, it was held that although the purchaser at the first sale took the legal title, a court of equity would set aside the first sale and order another, from the proceeds of which the several notes should be paid, according to the order of their maturity.[3]

1940. The rights of different claimants of the surplus money may be determined in suits brought by them against the mortgagee for money had and received;[4] or he may himself by bill of interpleader bring the claimants into court and ask for its direction to whom to pay it. He is in some sort a trustee of the money in his hands for those entitled to it, and should retain it until the rights of the parties are determined.[5]

If a second mortgagee, instead of selling the title mortgaged to him, sells with the assent of the prior mortgagee the entire title in the land, the surplus remaining after paying the first and second mortgages belongs to the next subsequent parties in interest, and

[1] Shermer *v.* Merrill, 33 Mich. 284. See § 1459.

[2] § 1699; Flower *v.* Elwood, 66 Ill. 438; Herrington *v.* McCollum, 73 Ill. 476.

[3] Koester *v.* Burke, 81 Ill. 438.

[4] Cope *v.* Wheeler, 41 N. Y. 303; Matthews *v.* Duryee, 45 Barb. (N. Y.) 69; Bevier *v.* Schoonmaker, 29 How. (N. Y.) Pr. 411; Webster *v.* Singley, 53 Ala. 208; Cook *v.* Basley, 123 Mass. 396. As to proceedings in New York, to determine to whom the surplus belongs, see Kirby *v.* Fitzgerald, 31 N. Y. 417; Matthews *v.* Duryee, 45 Barb. 69. But now provision is made by statute, which see, § 1751.

[5] Bleeker *v.* Graham, 2 Edw. (N. Y.) 647; People *v.* Ulster Com. Pleas, 18 Wend. (N. Y.) 628; Bevier *v.* Schoonmaker, 29 How. (N. Y.) 411.

a third mortgagee may maintain an action for money had and received. The fact that the sale was not made subject to the first mortgage does not affect the rights of the third mortgagee.[1]

Suit for the surplus by the person entitled to it is at law and not in equity.[2] Assumpsit lies against the mortgagee for the surplus arising from the sale, unless his obligation to pay it is in the form of a covenant or agreement under seal.[3] Where by statute the mortgagee is authorized to pay the surplus into court, or to the sheriff or other officer who makes the sale, such payment is a good defence to a suit brought against him to recover the surplus.[4]

It has been held that an agreement of the mortgagee to pay the surplus to the mortgagor does not extend to subsequent incumbrancers, so as to give them any right of action for a surplus not actually received by the mortgagee, but allowed by him to be retained by the purchaser under a claim of his own upon the property. The court say that although a trust would in such case arise in favor of the mortgagor, yet he cannot be regarded as a trustee for subsequent incumbrancers until the surplus money has actually been received by him.[5] The purchaser, however, would be liable to the incumbrancer entitled to the surplus.

[1] Cook *v.* Baley, 123 Mass. 396.

[2] Ballinger *v.* Bourland, 87 Ill. 513.

[3] Stoever *v.* Stoever, 9 Serg. & R. (Pa.) 434; Cope *v.* Wheeler, 41 N. Y. 303.

[4] Bailey *v.* Merritt, 7 Minn. 159.

[5] Russell *v.* Duflon, 4 Lans. (N. Y.) 399.

INDEX.

Reference is to Sections.

ABSOLUTE CONVEYANCE, made for security, is a mortgage, 264.
delivered in payment of an existing debt, 267.
parol evidence to show mortgage, 282–342.
true character of, inquired into, 324.
based on preëxisting debt, 326.
delay in asserting it to be a mortgage, 330.
immaterial that it is made by debtor, 331.
when a trust, 332.
grantor redeeming must do equity, 336.
election to treat conveyance as absolute, 358.
as to third persons grantee is owner, 339.
grantee's liability for land sold, 341.
bill in equity to redeem as from mortgage, 342.
an alienation within terms of an insurance policy, 423.
record of separate defeasance, 548.
purchaser may rely upon apparent title, 548.
grantor in may redeem, when a mortgage, 1060.
grantee in possession liable to account, 1117.
ABSTRACT OF TITLE, mortgage of, 148.
ACCEPTANCE OF MORTGAGE, essential to its execution, 84.
subsequent, 85.
by *cestui que trust* presumed, 88.
ACCESSIONS to mortgaged property, when covered by mortgage, 149
products of the soil, 150.
growing crop, 151.
to the franchise of a corporation, 155.
of vendor in possession, 234.
ACCIDENT OR MISTAKE, ground for relief from foreclosure, 1275.
ground for setting aside foreclosure sale, 1675.
ACCOUNT, of mortgagee in possession, 1114–1143.
reference to state, 1104.
wholly a matter of equitable jurisdiction, 1115.
mortgagee chargeable only upon redemption, 1116.

ACCOUNT — *continued.*
grantee in possession under absolute deed, 1117.
who is liable to account, 1118.
assignee stands in place of assignor respecting, 1119.
no liability unless possession be taken, 1120.
What the mortgagee is chargeable with, 1121–1125.
when mortgagor remains in possession, 1121.
when mortgagee himself occupies, 1122.
accountable only for actual rents, 1123.
except in case of wilful default or negligence, 1123.
when he has kept no proper accounts, 1124.
working of a mine, 1125.
Allowances for repairs and improvements, 1126–1131.
rule as to repairs, 1126.
rule as to improvements, 1127.
exception to rule, 1128.
necessary and ornamental repairs, 1129.
when property intermingled, 1130.
expenses of running a church, 1131.
Allowance of compensation, 1132, 1133.
mortgagee not entitled to, for his own services, 1132.
rule in Massachusetts, 1133.
rule in Connecticut, 1133.
Allowance for disbursements, 1134–1138.
taxes paid by mortgagee, 1134.
insurance premiums, 1135.
prior incumbrances paid, 1137.
counsel fees paid, 1138.
Annual rests, 1139–1143.
rule for, in stating account, 1139.
when there is a surplus of rents, 1140.
binds subsequent incumbrancers, 1142.
may be opened for fraud, 1143.
ACCOUNTING, payment by, 919–923.
ACKNOWLEDGMENT essential to admit to record, 83.
before deed is written, not valid, 83.
a requisite to registration, 527, 533.
by attorney, 533.
officer taking must be qualified, 534.
is a ministerial act, 535.
certificate of official character of officer, 536.
certificate of officer's personal acquaintance, 537.

ACKNOWLEDGMENT — *continued.*
certificate of not conclusive, 538.
a mistake in, 538.
as to statements of facts, 538.
fraud in, 538.
of right of redemption, by mortgagee in possession, 1162, 1171.
ACTION when right of accrues on mortgage debt, 76, 1174–1191, 1289.
right of subject to mortgage, 159.
defence that right of has not accrued, 1301.
bill to foreclose should show it has accrued, 1471.
ADJOURNMENT of sale under decree of court, 1634.
discretionary power of officer as to, 1634.
sale may be kept open when, 1635.
of sale under power, 1873–1875.
mortgagee may exercise discretion, 1873.
whether notice of required, 1874.
ADMINISTRATOR. (See EXECUTOR.)
ADVERSE CLAIMANTS cannot be made parties to foreclosure suit, 1440, 1445, 1474, 1589.
ADVERSE POSSESSION. (See POSSESSION.)
ADVERTISEMENT, foreclosure by. (See POWER OF SALE.)
in Maine, 1240.
in New Hampshire, 1241.
AFFIDAVIT of sale under power, 1904, 1905.
omission of does not invalidate title, 1904.
what required to make it presumptive evidence, 1905.
AFTER-ACQUIRED PROPERTY, when subject to mortgage, 152.
rule as to, 153.
of railroad companies, 154, 156.
of corporation, whether incident to the franchise, 155.
when mortgage passes without particular mention, 157.
mortgage of attaches subject to existing liens, 158.
as affected by registration, 561.
AFTER-ACQUIRED TITLE, of mortgagor enures to mortgagee, 679, 825.
by tax sale, 680.
not a defence in foreclosure suit, 1305.
when decree of sale covers, 1581, 1656.
AGENT. (See ATTORNEY.)
notice to affects principal, 584.
notice to director of corporation, 590.
when fraud of avoids mortgage, 612.

AGENT — *continued.*
taking commission from mortgagor whether usury, 642.
authority of to receive payment may be inferred from possession of securities, 964.
AGREEMENT to give a mortgage is in equity a mortgage, 163.
need not be in writing, 164.
by corporation entered on its records, 165.
affecting a mortgage should be recorded, 478.
fixing priority of mortgages, 608.
to pay taxes on mortgage debt not usury, 636.
of grantor to discharge a mortgage, 766.
AGREEMENT TO RECONVEY, in connection with deed, is a mortgage when, 241–281.
ALABAMA, nature of a mortgage in, 18.
power of a married woman to mortgage, 117.
vendor's lien adopted, 191.
vendor's lien assignable, 212.
parol evidence to prove a mortgage, 286.
provisions respecting registration, 481.
provisions respecting mechanics' liens, 481.
usury, law of, 633.
assignment of debt without mortgage in, 817.
provisions for entering satisfaction of record, 992.
redemption after foreclosure, 1051, 1322.
statute of limitations, ten years, 1193.
statutory provisions relating to foreclosure, 1322.
strict foreclosure in, 1541.
power of sale mortgages and trust deeds in, 1723.
ALIENS may hold mortgages, 132.
ALTERATIONS of mortgage, what are material, 94.
which do not change legal effect, 95.
verbal after execution, 96.
ANGLO-SAXONS, mortgages used by, 1, 2.
ANNUAL RESTS, in stating mortgagee's account, 1139, 1140.
ANSWER in foreclosure suit, 1479–1515.
APPROPRIATION OF PAYMENT. (See PAYMENT, 904–912.)
ARIZONA TERRITORY, provisions respecting registration in, 481 *a.*
provisions respecting mechanic's liens, 481 *a.*
provisions for entering discharge of record, 992 *a.*
statutory provisions relating to foreclosure, 1322 *a.*
usury laws in, 633.
compound interest allowed in, 650.

Reference is to Sections.

ARKANSAS, nature of a mortgage in, 19.
written authority for filling blanks, 90.
vendor's lien adopted, 191.
not assignable, 212.
parol evidence to prove a mortgage, 287.
provisions respecting registration in, 482.
provisions respecting mechanics' liens, 482.
usury laws in, 633.
compound interest in, 650.
entering discharge of record, 992.
no redemption after foreclosure, 1051, 1323.
statute of limitations, five years, 1193.
statutory provisions relating to foreclosure, 1323.
power of sale mortgages and trust deeds in, 1724.
ASSIGNEE of bankrupt mortgagor has only the rights of the mortgagor, 468.
ASSIGNEE OF MORTGAGE is a purchaser, 475.
priority between different assignees, 476.
should notify owner of estate of his rights, 791.
stands in place of assignor in respect to accounting, 1119.
party to foreclosure suit, 1371–1373.
holding as collateral security may foreclose, 1374–1375.
of mortgage without note cannot foreclose, 1376.
of note may foreclose, 1377.
of note of junior mortgage, party defendant to foreclosure suit, 1427.
title of must be shown on foreclosure, 1457.
defences against, in foreclosure suit, 1485.
need not have paid value, 1486.
when he takes free from equities, 1487.
equitable cannot execute power, 1789.
ASSIGNMENT of rents and profits, an equitable mortgage, 171.
of contract of purchase, an equitable mortgage, 172, 173, 174.
of certificate of public lands, 176.
ASSIGNMENT OF MORTGAGE, with agreement to reassign, 280.
absolutely as collateral security, 333.
of contract of purchase as security, 334.
recording acts apply to, 472.
consequences of omitting record of, 474.
record of not notice to mortgagor, 473.
assignee is a purchaser within recording acts, 475.
delivery of note essential to, 476.
manner of recording, 477.

ASSIGNMENT OF MORTGAGE — *continued.*
effect of recording, 566.
a formal assignment, 786.
legal title transferred by deed only, 787.
consideration of, 788.
possession of mortgagor does not prevail, 789.
delivery is essential to, 790.
whether it may be compelled on payment, 792, 1064.
when it may be compelled in equity, 793.
Who may make, 794–803.
a joint mortgagee, 794.
one of several trustees cannot, 795.
one of several executors may, 796.
foreign executor cannot, 797.
whether officer of corporation may, 796.
by unincorporated association, 799.
by partnership, 800.
by attorney, 801.
when a mortgage of indemnity is subject to, 802.
of mortgage conditioned to support, 803.
What constitutes, 804–812.
of mortgage without the debt, 804.
of mortgage generally carries the debt, 805.
delivery of mortgage without note is not, 806.
assignment of mortgage and delivery of note is, 807.
deed of release or quitclaim is, 808.
deed of heir before settlement of estate, 809.
deed by mortgagee constitutes, 810.
deed by mortgagee of part of the estate is, 811.
an ineffectual foreclosure operates as, 812, 1678.
Equitable, 813–822.
what constitutes, 813.
mortgagee cannot discharge after, 814.
of bond for a deed, 815.
by power of attorney, 816.
of debt without mortgage, 817.
does not carry legal estate, 817.
legal interest of mortgagee, 818.
mortgagee holds legal estate in trust, 819.
effectual as to whom, 820.
assignment of part of debt, 821.
when assignee of one note has priority, 822.

ASSIGNMENT OF MORTGAGE — *continued.*

Construction and effect of assignment, 823–833.

law of place, 823.
passes nothing beyond the mortgage title, 824.
passes after-acquired title when, 825.
carries power of sale, 826.
as collateral security, 827.
induced by fraudulent representations, 828.
made in fraud of creditors, 828.
passes all the securities, 829.
whether it carries a separate contract of guaranty, 830.
covenant that assignor will not collect, 831.
usury in, 832.
cancellation of, 833.

Whether subject to equities, 834–847, 1507.

of negotiable note before due free from equities, 834, 1487.
although consideration of mortgage void, 835.
when made subject to rights of mortgagor, 836.
when note indorsed and mortgage delivered, 837.
doctrine that assignee takes subject to equities, 838.
ground of this doctrine, 839.
doctrine of United States Supreme Court, 840.
when note is overdue, 841.
of bond is subject to equities, 842.
whether rule limited to equities between original parties, 843.
equities in favor of third persons, 844.
doctrine approved in New York, 845.
no parol trust can attach, 846.
equities arising after assignment, 847.
of mortgage to one co-tenant no merger, 849.
to wife of mortgagor no merger, 850.
when it operates as a discharge, 861, 864.
to one who has assumed the mortgage, 865.

cannot be compelled upon payment, 1086.
doctrine otherwise in New York, 1087.
after entry does not stay foreclosure, 1266.
writ of entry after assignment as collateral, 1282.
pending foreclosure suit, 1488.
amount of decree after assignment as collateral, 1592.
whether priority of assignment gives priority, 1701.
when legal, passes power of sale, 1787.

ASSIGNMENT OF MORTGAGE — *continued.*
equitable, does not pass the power, 1789.
after advertisement under power of sale, 1832.
invalid sale under power operates as, 1902.
ASSUMPTION OF MORTGAGE, by married woman, 116, 753.
by purchaser of equity of redemption, 740–770.
mortgagor becomes surety for purchaser, 741.
of proportionate part of mortgage, 743.
agreement to pay mortgage, 749.
verbal promise to assume, 750.
grantee bound by accepting deed, 752.
married woman bound on her covenant to assume, 753.
ground on which mortgagee may take advantage of, 755.
junior mortgagee not liable on agreement for, 756.
in absolute deed which is in fact a mortgage, 757.
ground on which mortgagee may have benefit of, 758, 759.
that it is a promise for his benefit, 758.
grantor need not be liable for debt, 760.
promise must be express, 761.
doctrine, New York and other states, 762.
whether grantor can release the purchaser, 763.
when grantor may release the purchaser, 763.
condition to pay or assume, 765.
remedy of grantor an agreement of, 768.
when agreement may be enforced, 769.
measure of damages for breach of agreement, 770.
ATTACHMENT of equity of redemption may be enforced upon surplus, 665.
none of mortgagee's interest, 701.
ATTORNEY must execute deed in name of principal, 130.
fees of, secured by mortgage, 359, 1606.
acknowledgment by, 533.
delivery to, 539.
notice to affects principal when, 584.
on what principle the doctrine rests, 585.
must be in the same transaction, 586.
must be of matter material to the transaction, 586.
when same attorney is employed by both parties, 588.
when agent himself is a party, 589.
provision for payment of fees for foreclosure not usurious, 635.
assignment of mortgage by, 801.

ATTORNEY — *continued.*
authority of to receive payment, 964.
mortgagee allowed fees paid for collecting rents, 1138.

BANKRUPTCY does not affect vendor's lien, 202.
assignee in, has only debtor's rights as regards unrecorded mortgages, 468.
mortgagee may prove claim in or not, 729.
effect of upon redemption by debtor, 1073.
discharge does not prevent foreclosure suit, 1231.
in what court lien may be enforced, 1232.
suit in state court not suspended, 1233.
when bankruptcy proceedings are in another state, 1234.
court may order sale subject to mortgage, 1235.
how mortgagee may prove his claim in, 1236.
assignee in, should be made party to foreclosure suit, 1438.
sale without leave of court in, 1908.
surplus proceeds of sale under power belong to assignee, 1932.
BANKS, national, prohibited loaning on mortgages, 134.
remedy for violation of this prohibition, 134.
BEQUEST of mortgage, 700.
BILL OF INTERPLEADER, answer to foreclosure suit by, 1515.
BLANKS IN MORTGAGE, authority to fill, 90, 91.
BOND subject to equities in hands of assignee, 842.
BONUS paid for extension of mortgage, 647, 648.
application of, 912.
BUILDING, mortgage of, as part of the realty, 142.
removal of from mortgaged land, 143.
floated off the mortgaged land, 144.
on leased land, mortgage of, 146.
on mortgaged land a fixture, 433.
BURDEN OF PROOF that a mortgage is usurious, 643.

CALIFORNIA, nature of a mortgage in, 20.
form of mortgage, 61.
written authority for filling blanks, 90.
vendor's lien adopted, 191.
not assignable, 212.
vendee's lien in, 223.
parol evidence to show a mortgage, 288.
record of assignment not notice to mortgagor, 473.
provisions respecting registration in, 483.

CALIFORNIA — *continued.*
provisions respecting mechanics' liens in, 483.
usury law in, 633.
compound interest allowed in, 650.
assignment of debt without mortgage in, 817.
entering satisfaction of record, 994.
redemption after foreclosure, 1051, 1324.
when right to redeem barred in, 1145.
statute of limitations, four years, 1193.
mortgage barred when debt is barred, 1207.
statutory provisions relating to foreclosure, 1324.
strict foreclosure in, 1543.
power of sale mortgages and trust deeds in, 1725.
CERTIFICATE of purchase by officer making foreclosure sale, mistake in, 1051.
of witnesses to entry for foreclosure, 1259, 1260.
of mortgagor to entry for foreclosure, 1261.
record of, 1263.
CESTUI QUE TRUST, suit of foreclosure by, 1384.
when should be made parties to suit by trustee, 1397–1399.
CHANGES IN FORM OF DEBT. (See PAYMENT, 924–942.)
COLORADO, nature of a mortgage in, 21.
vendor's lien adopted, 194.
provisions respecting registration in, 484.
provisions respecting mechanics' liens in, 484.
usury law in, 633.
entering discharge of record, 995.
redemption after foreclosure, 1051, 1325.
statute of limitations, six years, 1193.
statutory provisions relating to foreclosure, 1325.
power of sale mortgages and trust deeds in, 1726.
COMPENSATION of mortgagee in possession, 1132, 1133.
COMPOUND INTEREST. (See INTEREST.)
COMPUTATION of interest, 655.
CONDEMNATION of land for street, effect upon mortgage, 708.
CONDITION, in mortgage, 4.
form of, 69, 242.
must give reasonable notice, 70.
illegal, 249.
strict performance of revests title, 887.
upon what breach the right to foreclose accrues, 1174–1191.
of promptness of payment, 1179.

CONDITION — *continued.*
default at election of mortgagee, 1182.
provisions against forfeiture, 1184.
court will not relieve against forfeiture, 1185.
waiver of default of credit, 1186.
to pay or save harmless, 1188.
CONDITIONAL SALE distinguished from a mortgage, 256–281.
in equity the tendency is to make the transaction a mortgage, 257.
intention is the criterion, 258.
in doubtful cases the transaction is regarded as a mortgage, 258, 279.
will be upheld when clearly intended, 259.
the evidence should be clear, 260.
the intent may appear by the instrument, 261.
the purchaser's rights are to be regarded, 262.
character of the transaction fixed at its inception, 263.
the existence of a debt the test, 265.
where the contract is made upon an application for a loan, 266.
when an existing debt is not cancelled, 267.
purchase for benefit of another, 268.
a continuing debt shows a mortgage, 269.
agreement that grantee may buy, 270.
agreement that grantee may sell, 271.
when there is no obligation for the payment of any debt, 272.
payment of interest, 273.
continued possession of grantor, 274.
inadequacy of price, 275.
recording as a mortgage, 276.
intention may be shown by parol evidence, 277.
slight circumstances determine, 278.
assignment with agreement to reassign, 280.
CONFIRMATION OF SALE. (See FORECLOSURE SALE, 1637–1641, 1670.)
CONFLICT OF LAWS as to usury, 656–663.
CONNECTICUT, nature of a mortgage in, 22.
vendor's lien not adopted, 191.
parol evidence to show a mortgage, 289.
statutory provisions as to fixtures, 443.
provisions respecting registration in, 485.
provisions respecting mechanics' liens in, 485.
usury in, 633.

CONNECTICUT — *continued.*
entering discharge of record, 996.
redemption after foreclosure, 1051, 1326.
statute of limitations, fifteen years, 1193.
statutory provisions relating to foreclosure, 1326.
strict foreclosure, the usual form in, 1544.
power of sale mortgages and trust deeds in, 1727.
CONSIDERATION, description of in mortgage, 64.
mortgage made without, to raise money, 86.
mortgage without placed in escrow, 87.
defence of want or failure of, 610–616.
none need pass at time of execution, 611.
implied from seal, 613.
of accommodation mortgage, 615.
when mortgagor estopped to deny, 616.
illegal, avoids mortgage, 617.
who may take advantage of, 619.
when it can be separated, 620.
burden of proof of, 622.
want of in mortgage assumed no defence, 744.
of assignments, 788.
proof of, in foreclosure suit, 1470.
want of a defence in foreclosure suit, 1297, 1490.
one buying subject to mortgage cannot set up want of, 1491.
CONSOLIDATING MORTGAGES, the English doctrine, 1083.
not applied in America, 1083.
redemption of other claims cannot be compelled, 1081.
CONSTRUCTION, note and mortgage construed together, 71.
principles of, 101
CONTRIBUTION TO REDEEM, 1089–1092.
when the right arises, 1089.
the general rule respecting, 1090.
portion retained by mortgagor first liable, 1091.
portions sold liable in inverse order, 1092.
according to value is rule where, 1626.
valuation to be made of what time, 1627.
sale not enjoined to allow, 1812.
CORPORATION, designation in mortgage to, 63.
habendum in mortgage to, 67.
may make a mortgage, 102, 124.
power of alienation restrained, 124.
limitation of railroad companies to mortgage, 125.

CORPORATION — *continued.*
religious, may mortgage, 126.
the power to mortgage resides in the stockholders, 127.
must use corporate seal, 128.
may take mortgages, 134.
national banks restricted as to real estate security, 134.
not bound by notice to director of, 590.
authority of treasurer of to assign, 798.
assignment by unincorporated associations, 799.
COSTS, incurred by refusal of sufficient tender, 902.
of previous foreclosure upon redemption, 1084.
rule respecting in bill to redeem, 886, 1111.
of suit brought without previous tender, 1112.
when mortgagee has refused tender, 1113.
on decree of strict foreclosure, 1568.
of previous action at law included in decree, 1598.
In equitable suit for foreclosure, 1602–1607.
discretionary with court, 1603.
of subsequent incumbrancers, 1604.
of defendants who appear and answer, 1605.
counsel fees, 1606.
stipulation for in mortgage, 1606.
of irregular attempt to foreclose, 1607.
of subsequent mortgagees, 1908.
of sale under power, 1923–1926.
COUNSEL FEES. (See ATTORNEY.)
COUPONS for interest 653.
draw interest after maturity, 1141.
COVENANT, in mortgage, 68, 1225.
importance of, 68.
for payment of the debt, 72, 1225.
for payment of taxes, 77.
of mortgagor to pay debt, none implied, 678.
implied in assignment, 831.
in purchase money mortgages, 1501–1505.
CREDIT, foreclosure sale on, 1615.
on sale under power, 1868–1872.
CROPS, growing, may be mortgaged, 150.
not sown, how mortgaged, 151.
registry laws apply to mortgage of, 479.
mortgagee entering may appropriate, 1116.
purchaser at foreclosure sale entitled to, 1658.

DAKOTA TERRITORY, nature of a mortgage in, 23.
form of mortgage, 61.
parol evidence to show a mortgage, 290.
provisions respecting registration in, 486.
provisions respecting mechanics' liens in, 486.
usury in, 633.
entering discharge of record, 997.
statute of limitations, twenty years, 1193.
statutory provisions relating to foreclosure, 1327.
power of sale mortgages and trust deeds in, 1728.
DAMAGES for mortgaged land taken in the exercise of the right of eminent domain, 681, 708.
measure of for breach of agreement to pay a mortgage, 770.
DATE not essential, 89.
DEBT, secured, description of, 70, 343–395.
requisites of description, 70.
note and mortgage construed together, 71.
covenants to pay, 72, 1225.
time of payment of, 75.
provision that whole shall become due on any default, 76.
on default in payment of taxes, 77.
on default in payment of insurance premium, 78
general description sufficient, 343.
amount of ascertained debt should be stated, 344.
must come fairly within terms used, 345.
unliquidated, 346.
antecedent, 347.
when mortgage is larger than, 348.
description of note, 349.
not necessary to give all particulars of, 350.
notes are evidence of amount of, 351.
parol evidence to identify note, 352.
mistakes in description of, 354.
several mortgages securing one debt, 356.
enlarging terms of mortgage, 357.
taxes and assessments, 358.
solicitor's fee, 359.
tacking other debts, 360.
increasing rate of interest, 361.
a further debt secured, 363.
future advances, 364–378.
indemnity, 379–388.

DEBT — *continued.*
recital of in mortgage, 677.
no covenant of implied, 678.
remedy for debt and upon lien concurrent, 1215–1220.
foreclosure suit no bar to suit for debt, 1222, 1223.
personal remedy excluded when, 1226.
personal remedy after foreclosure, 1227.
description of, must be set out in bill to foreclose, 1466.
DECREE in suit to redeem, 1106.
should fix time for redemption, 1107.
failure to pay works foreclosure, 1108.
in suit for strict foreclosure, 1561, 1569, 1572.
Of sale, 1571–1607.
by court of equity without the aid of statute, 1573.
Form and requisites of, 1574–1586.
may follow terms of mortgage, 1575.
should provide order of sale, 1576.
where only part of debt is due, 1577.
of sale subject to part of debt not due, 1577.
for only the relief sought for, 1578.
should protect other interests, 1579.
when junior mortgagee forecloses, 1580.
after-acquired title when covered, 1581.
debt not apportioned between co-tenants, 1582.
where there are two mortgages, 1583.
death of mortgagor as affecting, 1584.
death of plaintiff as affecting, 1585.
no time for redemption allowed, 1586.
Conclusiveness of, 1587–1589.
cannot be attacked collaterally, 1587.
while unreversed, 1588.
prior and adverse rights not affected, 1589.
Amount of, 1590–1601.
should be fixed, 1590.
when part not due, 1591.
when mortgage held as collateral, 1592.
may exceed penalty of bond, 1593.
interest, 1594.
exchange, 1595.
insurance, 1596.
taxes, 1597.
costs of previous action to foreclose, 1598.

DECREE — *continued.*
disbursements by plaintiff, 1599.
final, when, 1600.
no stay of on account of controversy between subsequent incumbrancers, 1601.
costs, 1602–1607.
DEED, and passing of title under foreclosure sale, 1652.
delivery of deed, 1653.
title relates back to execution of mortgage, 1654.
errors in deed, 1655.
certificate of purchase, 1661.
Under power of sale, 1889–1903.
holder of legal title should make deed, 1889.
married woman may make deed, 1890.
mortgagee may make deed to himself, 1892.
title passes by delivery of, 1894.
not evidence of recitals in it, 1895.
DEED OF TRUST, legal effect of, 62.
omission of words of importance in, 67.
to secure all creditors of the grantor, how enforced, 1448.
is a mortgage in legal effect, 1769.
often preferred to mortgage, 1770.
trustee is agent of both parties, 1771.
debt belongs to beneficiary, 1772.
when court will appoint new trustee, 1774.
when court executes the power, the sale is by virtue of that, not of the decree, 1775.
when debt is unliquidated, 1776.
acceptance of trust, 1780.
cannot be assigned without authority, 1788.
to two or more must be executed by all, 1790.
insolvency of trustee no ground for enjoining, 1816.
trustee should be personally present at sale, 1862.
trustee buying at sale under power, 1880.
sale under must be fairly executed, 1906.
DEFAULT, meaning of term, 1191.
DEFEASANCE, form of, 69, 242.
separate instrument of, 241.
must be to grantor, not to a third person, 241.
separate, objections to, 243.
and deed constitute a mortgage, 244.
when part of one transaction, 245.

DEFEASANCE — *continued.*
when delivered at same time, 246.
delivered as an escrow, 247.
parol evidence to connect with deed, 248.
illegal condition, 249.
when once established gives right of redemption, 250.
grantee cannot renounce redemption beforehand, 251.
cancellation of, 252.
substitution of new defeasance, 252.
recording of, 253, 548.
when not recorded grantee may convey good title, 549.
surrender of, 928, 977.
DEFECT in title excuses purchaser when, 1645, 1646.
DEFENCES, to bill to redeem, 1105.
to writ of entry to foreclose, 1296–1305.
to bill in equity for foreclosure, 1479–1515.
DEFICIENCY after foreclosure, liability of married woman for, 111.
suit at law for, after sale under power, 1227.
suit at law for, after foreclosure sale, 1228.
personal judgment for, must be asked for, 1477.
judgment for, in equitable suit, 1709–1721.
statutory provisions in several states, 1709.
third persons liable may be joined, 1710.
court of equity cannot generally give judgment without aid of statute, 1711.
one who has bought subject to the debt not liable for, 1712.
when purchaser is bound to pay the debt, 1713.
though conveyance be merely for security, 1714.
when there is no bond or note, 1715.
no judgment for parts of debt not due, 1719.
when judgment for becomes a lien, 1720.
personal remedy may be enforced without foreclosure, 1721.
DELAWARE, nature of a mortgage in, 24.
provisions respecting registration in, 487.
provisions respecting mechanics' liens in, 487.
usury in, 633.
entering satisfaction of record, 998.
no redemption after foreclosure, 1051, 1328.
statute of limitations, twenty years, 1193.
statutory provisions relating to foreclosure, 1328.
power of sale mortgages and trust deeds in, 1729.
DELIVERY of mortgage essential, 84, 85, 539.

DELIVERY — *continued.*
of mortgage made for purpose of sale, 86.
in escrow, 87.
registration does not operate as, 539.
to an agent, 539.
after recording, 540.
to a stranger, 540.
presumption as to, 540.
subsequent, when becomes operative, 541.
essential to assignment, 790.
DEPOSIT of money required on foreclosure sale, 1614.
forfeiture of, 1644.
at sale under power, 1866.
DEPOSIT OF TITLE DEEDS, an equitable mortgage, 179–188.
DESCRIPTION, of the parties, 63.
of the debt. (See DEBT.)
Of the premises, what is requisite, 65, 528.
uncertainty in, 66.
apparent error in, 529.
must be set out in bill to foreclose, 1462.
of property in notice of sale, 1840.
DESTRUCTION of record of mortgage, 559.
DEVISEE should redeem when, 1062.
necessary party defendant to foreclosure suit, 1418.
DISABILITIES of insanity, infancy, &c., 103–105.
none to prevent the taking of a mortgage, 131.
DISBURSEMENTS by mortgagee in possession, 1134–1138.
by plaintiff in foreclosure proceedings, 1599.
DISCHARGE, mortgagee cannot make after assignment, 814.
operates as an assignment when, 858.
when payment operates as, 888, 889.
who may make, 956–965.
owner of debt should make, 956.
when made by person other than mortgagee, 957.
when mortgage is held by two or more jointly, 958.
one of two executors may make, 959.
one of two trustees cannot make, 959.
whether foreign executor can make, 960.
assignee may make, 961.
assignee holding as collateral may make, 963.
obtained through fraud or made by mistake, 966.
fraudulent, is not payment, 967.

DISCHARGE — *continued.*
personal judgment when mortgage cannot be reinstated, 968.
when made through mistake of fact may be cancelled, 969.
when assignment was intended, 970.
when new mortgage is substituted in ignorance of an intervening lien, 971.
Form and construction of discharge, 972–988.
mode of effecting, 972.
deed of release or quitclaim, 972.
after payment, mortgagee trustee of legal title, 973.
where mortgage is regarded as a mere lien, 974.
in case of a mortgage of indemnity, 975.
whether a general release discharges mortgage, 976.
by foreclosure of prior mortgage, 978.
verbal agreement to release, 979.
may be limited in its operation, 980.
of a portion of the mortgaged premises, 981.
effect of release of personal liability of mortgagor, 983.
release of security does not necessarily release debt, 984.
effect of upon title of person to whom it is made, 985.
through representations or conduct of mortgagee, 986.
wrongfully obtained, 987.
debtor should tender the instrument, 988.
Entry of record, 989–991.
penalty for neglecting to make, 990.
when holder of mortgage liable to penalty, 991.
Statutory provisions for entering of record in the several states, 992–1037.
defence of, must be clearly set up, 1512.
DISTRICT OF COLUMBIA, provisions respecting registration in, 488.
provisions respecting mechanics' liens in, 488.
usury in, 633.
entering satisfaction of record, 999.
statutory provisions relating to foreclosure, 1329.
power of sale mortgages and trust deeds in, 1730.
DOWER, fraudulent release of after execution, 95.
purchase money mortgage not subject to, 464.
mortgagor's widow entitled to, 666.
principle of merger as applied to, 866, 867.
gives right to redeem mortgage, 1067.
in surplus proceeds of foreclosure sale, 1693, 1694.
in surplus proceeds of sale under power, 1933.

DURESS avoids mortgage obtained by, 626.
in obtaining wife's acknowledgment to deed, 538.

EARNINGS of railroad may be mortgaged, 160.
EJECTMENT, mortgagor cannot maintain against mortgagee, 674.
mortgagee may recover possession by, 719.
ELECTION of mortgagee to consider mortgage due, 1182.
EMBLEMENTS, mortgagor's right to until possession taken, 697.
ceases when he surrenders possession, 697.
mortgagee may waive right to, 698.
mortgagor's tenant has no right to against mortgagee, 780.
purchaser under foreclosure sale entitled to, 1658.
ENFORCEMENT of mortgage, when right of accrues, 1174–1191.
remedies for, 1215–1236.
of foreclosure sale against purchaser, 1642–1651.
ENTRY to foreclose mortgage, 1246–1257.
ENTRY AND POSSESSION. (See FORECLOSURE BY.)
EQUITABLE ASSIGNMENT of mortgage, 813–822.
EQUITABLE MORTGAGE, various kinds of, 162–188.
by agreement to give a mortgage, 163.
by parol agreement, 164.
by entry of agreement on records of company, 165.
by informal deeds, 166, 168.
by deed defectively executed, 169.
by implied trust, 170.
by an assignment of rents, 171.
by assignment of contract of sale, 172, 173.
although conditional, 174.
or a partial interest, 175.
by assignment of certificate of public land, 176.
by preëmptor of public land, 177.
by deposit of title deeds, 179.
how enforced, 188.
within the recording acts, 469.
for precedent debt, 470.
EQUITY OF REDEMPTION, growth of the doctrine of, 6.
an estate in the land, 6.
when first established, 7.
what it is, 8.
ESCROW, delivery in, 87.
ESTATE TAIL, may be the subject of a mortgage, 137.

ESTOPPEL of mortgagor to take advantage of irregular filling up of deed, 92.
when it may be set up in such case, 93.
grantor by absolute deed may show true character of it, 323.
to deny consideration, 616.
to claim invalidity of mortgage, 631.
to claim it was made to defraud a creditor, 632.
to set up defence of usury, by certificate, 645.
to deny his title, 682, 1483.
to deny validity of mortgage, 683, 1482.
of mortgagee to assert his mortgage, 734.
of assignee to claim a merger, 853.
of purchaser to claim merger, 854.
of mortgagor to redeem, 1049.
of mortgagee to foreclose, 1189.
of mortgagor to deny his title, 1483.
by his declaration or agreements to take defences, 1484.
of purchaser subject to mortgage to set up usury, 1494.
EXCHANGE, payment of not usurious, 637.
not allowed on mortgage debt, 1595.
EXECUTION OF MORTGAGE, 81–99, 527–541.
proof of, 1455.
EXECUTION SALE of equity of redemption, effect of, 665.
of mortgaged premises for same debt, 1229.
may be made of other land, 1230.
EXECUTORS AND ADMINISTRATORS, mortgages by, 102.
assignments by, 796.
foreign assignments by, 797.
paying mortgage by accounting, 919–923.
purchasing mortgage on estate of deceased, 921.
mortgagee administering mortgagor's estate, 922.
one of two executors, &c., may discharge, 959.
whether foreign executor, &c., may discharge, 960.
may maintain writ of entry to foreclose, 1288.
proper parties to maintain equitable suit for foreclosure, 1388.
foreign, cannot maintain foreclosure suit, 1389.
mortgage to, how foreclosed, 1390.
of mortgagee, may exercise power, 1786.
EXONERATION from mortgage debt in favor of heir, 751.
EXTENSION of mortgage, husband has no presumptive authority to make in behalf of wife, 115.
makes a valuable consideration, 459, 649.

EXTENSION — *continued.*
agreement for should be recorded, 564.
usury paid for to be credited, 648.
when agreement for is void on account of usury, 649.
by purchaser, when it discharges the mortgagor, 742.
when it does not impair security, 942.
extends right of redemption, 1053.
estops mortgagee to foreclose, 1189, 1190.
a consideration necessary to support, 1190.
by parol agreement, 1191.
effect of upon homestead right, 1196.

FIXTURES, severed from the realty, whether personal property, 144.
what are covered by mortgage, 428.
intention largely determines, 429.
enumeration of some excludes others, 430.
mortgaged before attached to realty, 431.
hired, not subject to mortgage, 432.
buildings erected on mortgaged land, 433.
trees and shrubs in a nursery, 434.
annexed before mortgage, 434.
annexed after mortgage, 436.
under an equitable mortgage, 437.
agreement of parties as affecting rule, 438.
annexed by tenant of mortgagor, 439.
lessee's surrender of term, 440.
rule as to trade fixtures not applicable, 441.
rule in Vermont exceptional as to, 442.
statutory provisions in Vermont and Connecticut, 443.
in mill, rule of intention respecting, 444.
mortgage of realty preferred to one of fixtures, 445.
steam-engine and boiler, 446.
shingle machine, 447.
looms in mills, 448.
cotton looms, 449.
machinery of silk-mill, 450.
rolls of iron-mill, 451.
rolling stock of railways, 452.
remedies for removal of, 453, 695.
action for damages from removal of, 454, 695.
by mortgagee not in possession, 455.
pass to purchaser under foreclosure sale, 1657.

FLORIDA, nature of a mortgage in, 25.
vendor's lien adopted in, 191.
parol evidence to show a mortgage, 291.
provisions respecting registration in, 489.
provisions respecting mechanics' liens in, 489.
usury in, 633.
entering satisfaction of record, 1000.
no redemption after foreclosure, 1051, 1330.
statute of limitations, twenty years, 1193.
statutory provisions relating to foreclosure, 1330.
power of sale mortgages and trust deeds in, 1731.
FORCIBLE ENTRY AND DETAINER, not applicable to recovery of possession by mortgagee, 720.
FORECLOSURE, does not constitute payment, 950–955.
strict foreclosure is not payment, 950.
by entry and possession is payment *pro tanto* only, 952.
sale is payment *pro tanto*, 953.
sale under power is payment *pro tanto*, 953.
redemption after imperfect, 1048.
redemption after foreclosure of part, 1074.
redemption after sale under, 1051, 1075.
results from failure to redeem according to decree, 1108.
and redemption reciprocal, 1146.
When the right of action accrues, 1174–1191, 1289.
upon what breaches of condition it accrues, 1175.
default in payment of interest, 1176.
when whole debt becomes due, 1177.
when default in interest not enough, 1178.
promptness of payment a condition, 1179.
whole debt due on any default, 1180, 1181.
default at election of mortgagee, 1182.
who may take advantage of default, 1183.
provisions against forfeiture, 1184.
court will not relieve from default, 1185.
waiver of default, 1186.
guarantor must pay principal debt, 1187.
when condition is to pay or save harmless, 1188.
mortgagee estopped by agreement, 1189.
when time of payment is extended, 1190.
by parol, 1191.
When the right of is barred, 1192–1214.
statute of limitations applies by analogy, 1192.

FORECLOSURE — *continued.*
tendency to shorten period of limitation, 1193.
periods of limitation in the several states, 1193.
presumption of payment not conclusive, 1196.
presumption of payment repelled by circumstances, 1197.
payment of interest renews, 1198.
by one tenant in common, 1199.
payment of taxes, 1200.
purchaser assuming payment recognizes mortgage, 1201.
purchaser has no greater rights than mortgagor, 1202.
mortgage lien enforced though the debt is barred, 1204.
rule otherwise in what states, 1207.
statute runs from time the right of action accrues, 1210.
not waived by the recovery of judgment for debt, 1218.
Statutory provisions of the several states relating to, 1317–1366.
the statutes generally, 1317.
codes of procedure, 1318.
by special statute not allowed, 1320.
law in force when mortgage was made governs, 1321.
Alabama, 1322.
Arizona Territory, 1322 *a.*
Arkansas, 1323.
California, 1324.
Colorado, 1325.
Connecticut, 1326.
Dakota Territory, 1327.
Delaware, 1328.
District of Columbia, 1329.
Florida, 1330.
Georgia, 1331.
Idaho Territory, 1332.
Illinois, 1333.
Indiana, 1334.
Iowa, 1335.
Kansas, 1336.
Kentucky, 1337.
Louisiana, 1338.
Maine, 1339.
Maryland, 1340.
Massachusetts, 1341.
Michigan, 1342.
Minnesota, 1343.

FORECLOSURE — *continued.*
Mississippi, 1344.
Missouri, 1345.
Montana Territory, 1346.
Nebraska, 1347.
Nevada, 1348.
New Hampshire, 1349.
New Jersey, 1350.
New York, 1351.
North Carolina, 1352.
Ohio, 1353.
Oregon, 1354.
Pennsylvania, 1355.
Rhode Island, 1356.
South Carolina, 1357.
Tennessee, 1358.
Texas, 1359.
Utah Territory, 1360.
Vermont, 1361.
Virginia, 1362.
Washington Territory, 1363.
West Virginia, 1364.
Wisconsin, 1365.
Wyoming Territory, 1366.
FORECLOSURE BY ENTRY AND POSSESSION, 1237–1267.
is payment *pro tanto* of mortgage debt, 952.
nature of the remedy, 1237.
where used, 1238.
statutory provisions in Maine, 1239.
foreclosure by advertisement, 1240.
statutory provisions in New Hampshire, 1241.
when mortgagee is in possession, 1242.
provisions of statute must be strictly followed, 1243.
statutory provisions in Massachusetts, 1244.
statutory provisions in Rhode Island, 1245.
The entry, 1246–1257.
should be by holder of legal title, 1247.
by executor, &c., of mortgagee, 1248.
foreclosure of part of the premises, 1249.
assignment of, 1250.
by second mortgagee, 1251.
by married woman, 1252.

Reference is to Sections.

FORECLOSURE BY ENTRY AND POSSESSION — *continued.*
may be made at any time after breach, 1253.
upon a part of the land, 1254.
manner of making, 1255.
what is peaceable, 1256.
what is open, 1257.
The possession, 1258.
constructive only, 1258.
The certificate of witnesses, 1259, 1260.
what it must state, 1259.
is conclusive, 1260.
the certificate of mortgagor, 1261.
when the limitation of three years commences, 1262.
record of the certificate, 1263.
effect of the foreclosure upon the mortgage debt, 1264.
aiver of entry and possession, 1265–1275, 1569.
by express or implied agreement, 1265.
assignment of mortgage after entry, 1266.
waiver must be by holder of mortgage, 1267.
previous purchase under power not waived by entry, 1268.
payment is a waiver, 1269.
when the intention of the parties is doubtful, 1270.
rendering account, 1271.
conditional waiver, 1272.
writ of entry no waiver, 1273, 1286.
recovery of judgment for debt opens, 1274.
relief in case of accident or mistake, 1275.
FORECLOSURE BY WRIT OF ENTRY, 1276–1316.
nature of process and where used, 1276–1279.
Who may maintain, 1280–1289.
a legal interest essential, 1280.
after assignment, 1281.
after assignment as collateral, 1282.
joint mortgagees or assignees, 1283.
two mortgages held by one person, 1284.
junior mortgagee, 1285.
existence of homestead no objection, 1286.
prior entry to foreclosure no objection to, 1287.
executor or administrator of mortgagee, 1288.
when right of action accrues, 1289.
Against whom the action may be brought, 1290–1292.
the tenant of the freehold, 1290.

FORECLOSURE BY WRIT OF ENTRY — *continued.*
the wife of the mortgagor, 1291.
mortgagor may be joined after he has conveyed his equity of redemption, 1292.
Pleadings and evidence, 1293–1295.
the declaration, 1293.
answer, 1294.
evidence, 1295.
The defences, 1296–1305.
equitable defences allowed, 1296.
want of consideration, 1297.
payment, 1298.
surrender obtained by fraud, 1299.
usury, 1300.
right of action not accrued, 1301.
defence as to part of premises, 1302.
purchaser subject to mortgage, 1303.
promise not to enforce, 1304.
after-acquired superior title, 1305.
The conditional judgment, 1306–1315.
condition to pay within two months, 1306.
action to try title, 1307.
note should be produced, 1308.
amount of judgment, 1309.
when condition is not for payment of money, 1310.
sums paid to protect the estate, 1311.
in case of an indemnity mortgage, 1312.
set-off, when allowed, 1313.
in case of joint tenants, 1314.
when nothing is due, 1315.
judgment may be assigned, 1316.
FORECLOSURE BY EQUITABLE SUIT.
parties to, 1367–1442. (See PARTIES, ETC.)
jurisdiction and object of suit, 1443–1450.
courts of equity have inherent jurisdiction of, 1443.
venue, 1444.
claim of paramount title cannot be tried, 1445.
right of mortgagee to remove building determined, 1446.
stay of proceedings when process improperly used, 1447.
trust deed for security of all grantor's creditors should be enforced in equity, 1448.
title bond may be foreclosed in equity, 1449.

FORECLOSURE BY EQUITABLE SUIT — *continued.*
tender of payment not accepted does not prevent foreclosure suit, 1450.
The bill or complaint, 1451–1478.
general principles, 1451.
general requisites of complaint, 1452.
facts not inconsistent with bill may be proved, 1453.
what allegation of execution and delivery sufficient, 1454.
proof of execution, 1455.
complainant must show title, 1456.
assignee's title, 1457.
complainant having two mortgages on same premises, 1458.
foreclosure for instalment, 1459.
bill by holder of one of several mortgage notes, 1460.
when one mortgagor is not liable for the debt, 1461.
description of the property, 1462.
may omit part, 1463.
reforming description, 1464.
averment of record, 1465.
description of debt, 1466.
reference to determine amount of debt, 1467.
renewal of note should be alleged, 1468.
proof of note, 1469.
proof of consideration, 1470.
must show that right of action has accrued, 1471.
payment of indemnity secured should be alleged, 1472.
allegation that defendant has a subsequent lien, 1473.
must show that defendant's interest is subordinate, 1474,
all relief sought should be prayed for, 1475.
essential grounds of relief should be set out, 1476.
personal judgment for deficiency, 1477.
when some of the notes are not due, 1478.
Answer and defence, 1479–1515.
founded on written instrument should be set out, 1480.
denial of allegation must be explicit, 1481.
mortgagee's title cannot be questioned, 1482.
mortgagor estopped to deny his own title, 1483.
by his declarations, &c., 1484.
defences against assignee, 1485.
assignee need not have paid value, 1486.
when assignee takes free from equities, 1487.
transfer of mortgage pending suit, 1488.

FORECLOSURE BY EQUITABLE SUIT — *continued.*
indemnity mortgage, 1489.
want of consideration, 1490.
want of consideration in a mortgage assumed, cannot be set up, 1491.
fraud is a good defence, 1492.
usury is a defence, 1493.
usury cannot be set up by one who has bought subject to mortgage, 1494.
mortgagor may be estopped from setting up usury, 1495.
set-off, 1496, 1497.
what debt may be set off, 1498.
illegal interest previously paid, 1499.
defence to purchase money mortgage, 1500.
defence of outstanding incumbrance rests on the covenants, 1501.
eviction necessary before failure of title will avail, 1502.
cases exceptional to rule, 1503.
breach of covenant of seisin, 1504.
breach of independent covenant no defence, 1505.
when sale was effected by vendor's fraud, 1506.
this defence not good against assignee of mortgage before due, 1507.
validity of title may be a condition precedent to the payment of a purchase money mortgage, 1508.
statute of limitations, 1509.
insanity of mortgagor, 1510.
recovery of judgment on mortgage note no defence, 1511.
defence of discharge must be clearly set out, 1512.
agreement of parties subsequent to the mortgage, 1513.
want of service on another defendant, 1514.
bill of interpleader, 1515.

FORECLOSURE WITHOUT SALE, OR STRICT FORECLOSURE. (See DECREE OF SALE, 1571–1607.)
is payment *pro tanto*, 950.
failure to pay, decree of redemption operates as, 1108.
nature and use of this remedy, 1538–1541, 1572.
historical, 1538.
when proper, 1540.
in case of land contract, 1541.
in what states it is used, 1542–1556.
Pleadings and practice, 1557–1568.

FORECLOSURE WITHOUT SALE, ETC. — *continued.*
whole debt must be due, 1557.
parties to the bill, 1558.
heirs of mortgagee necessary parties, 1559.
pleadings, 1560.
judgment bars equity of redemption, 1561.
delivery of possession, 1562.
time allowed for redemption, 1563.
when defendant is an infant heir, 1564.
time for redemption always allowed, 1565.
dismissal of bill to redeem works, 1566.
effect is not to extinguish debt, 1567.
costs, 1568.
Setting aside and opening, 1569, 1570.
for want of service on defendant, 1570.
FORECLOSURE SALE, ineffectual, operates as an assignment, 812.
irregular, must be taken advantage of when, 1054.
a substitute for strict foreclosure, 1571.
court of equity may decree without aid of statute, 1573.
form and requisites of decree for, 1574–1586.
when part only of debt is due, 1577.
conclusiveness of decree for, 1587–1590.
Mode and terms of sale, 1608–1615.
nature of, 1608.
what may be sold, 1609.
when subsequent incumbrances provided for, 1610.
when questions of priority should be settled, 1611.
notice of, 1612.
terms of, 1613.
deposit required, 1614.
on credit, 1615.
Sale in parcels, 1616–1619.
may be required by statute or court, 1616.
when wishes of mortgagor to be followed, 1617.
when determined by court or reference, 1618.
on subsequent default, 1619.
Order of sale, 1620–1632.
when mortgagor has made successive sales in distinct parcels, 1620.
rule of inverse order, 1621.
in what states this rule prevails, 1621.
applies to mortgages as well as sales, 1622.

FORECLOSURE SALE — *continued.*
when portions have been sold under judgment, 1623.
record of subsequent deed not notice to mortgagee, 1624.
when the mortgage is made a common charge, 1625.
contribution according to value, 1626.
valuation to be made as of what time, 1627.
when other security to be first applied, 1628.
where mortgagee has a lien upon other property, 1629.
when mortgagee holds two mortgages, 1630.
when mortgagee has released part primarily liable, 1631.
when part of premises is homestead, 1632.
Conduct of sale, 1633–1636.
officer conducting should be present, 1633.
adjournment, 1634.
sale may be kept open, 1635.
objection to mortgagee's buying, 1636.
mortgagee may generally purchase, 1636.
Confirmation of sale, 1637–1641.
sale incomplete until confirmed, 1637.
usury not taken advantage of in this way, 1637.
rests wholly in discretion of court, 1638.
resale may be asked for by whom, 1639.
court may reopen biddings before confirmation, 1640.
great inadequacy of price may be urged against, 1641.
Enforcement of sale against purchaser, 1642–1651.
purchaser becomes *quasi* party, 1642.
performance enforced by attachment, 1643.
forfeiture of deposit, 1644.
when there is a defect in title, 1645.
defect in title prior to mortgage, 1646.
errors in decree or proceedings, 1647.
reference as to title, 1648.
incumbrance of taxes, 1649.
purchaser may be concluded by his conduct, 1650.
on what ground purchaser may refuse to complete sale, 1651.
Deed, and passing of title, 1652–1662.
another person may be substituted for purchaser, 1652.
delivery of deed, 1653.
title of purchaser relates back to execution of mortgage, 1654.
errors in deed, 1655.
after-acquired title, 1656.
fixtures, 1657.

FORECLOSURE SALE — *continued.*
emblements, 1658.
rents accruing, 1659.
when mortgagee purchases, no deed required, 1660.
purchaser's certificate of purchase, 1661.
appeal does not affect sale already made, 1662.
Delivery of possession to purchaser, 1663–1667.
may be compelled by writ of assistance, 1663.
against one who has entered pending suit, 1664.
when person in possession shows paramount title, 1665.
purchaser not entitled to order for possession until he has complied with terms, 1666.
summary proceedings do not preclude remedy by suit, 1667.
Setting aside of sale, 1668–1681.
when fraudulently conducted, 1668.
application for resale must be by party in interest, 1669.
after confirmation, inadequacy of price not sufficient, 1670.
when holder of mortgage becomes purchaser, 1671.
neglect of officer selling, 1672.
rights of purchaser always taken into account, 1673.
waived by delay, 1674.
mistake or accident, 1675.
mortgagor's absence, 1676.
few bidders, 1677.
invalid sale transfers mortgage, 1678.
second action to foreclose, 1679.
redemption can be had only by satisfying debt, 1680.
title of purchaser vacated when sale is set aside, 1681.
Application of proceeds of, 1682–1708.
according to decree of court, 1682.
prior liens and charges paid by mortgagee, 1683.
Disposition of surplus, 1684–1698.
usually paid into court, 1684.
court may appoint referee to settle claims, 1685.
upon filing of referee's report exceptions may be taken, 1686.
only claims that are absolute liens can be considered, 1687.
several liens, discharged according to priority, 1688.
simultaneous mortgages, 1689.
complainant himself may present claim, 1690.
equities of subsequent incumbrancers to be regarded, 1691.
prior unrecorded mortgage preferred to judgment, 1692.
dower in surplus, 1693.

FORECLOSURE SALE — *continued.*
inchoate right of dower, 1694.
surplus of sale after death of mortgagor, 1695.
lessee for years not entitled to any part, 1696.
attachment of proceeds of sale, 1697.
surplus of sale under junior mortgage, 1698.
Priorities between holders of several notes, 1699–1707.
note first maturing to be paid first, 1699.
of notes not due, 1700.
whether priority of assignment gives priority, 1701.
parties may change order of priority by agreement, 1702.
pro rata distribution, 1703.
when mortgagor has right of set-off, 1704.
rights of sureties, 1706.
costs of subsequent mortgagees, 1708.
FORFEITURE. (See INTEREST.)
of credit under mortgage, 1179–1186.
provision for is not a penalty, 1181.
who may take advantage of, 1183.
provisions against, 1184.
court cannot relieve from, 1185.
waiver of, 1186.
FORM of covenant in mortgage to pay debt, 72.
of interest clause or agreement that whole debt shall become due on any default, 76.
of purchaser's agreement to assume mortgage, 735.
of assignment of mortgage used in New England, 786.
in New York, 786.
in Maryland, 786.
of discharge of mortgage, 972.
in Maryland, 1010.
in Wisconsin, 1036.
of certificate by witnesses of mortgagee's entry, 1260.
of certificate of mortgagor of mortgagee's entry, 1260.
FORM OF MORTGAGE, 60.
of power of sale mortgage, 60.
statutory forms of mortgage, 61.
description of the parties, 63.
designation of junior, 63.
married woman, 63.
description of consideration, 64.

FRAUD, ground of constructive notice, 592.
as affecting priority, 602–604.
in concealing incumbrance, 602.
in inducing another to purchase the property as unincumbered, 603.
not the same as negligence, 603.
negligence may be evidence of, 604.
in obtaining mortgage avoids it, 624, 968.
intent of on part of mortgagee, 625.
in obtaining mortgage from wife, 626.
as respects creditors, 627.
as respects a particular creditor, 628.
in preference of a creditor, 629.
who may take advantage of, 630.
mortgagor may be estopped from setting up, 631.
in obtaining discharge of mortgage, 966, 967, 1299.
a defence in foreclosure suit, 1303, 1492.
FURTHER ADVANCES, redemption after, 1079.
FUTURE ADVANCES, mortgage may secure, 364–378.
sanctioned by the common law, 365.
statute requirement that amount be expressed in mortgage, 366.
description of the intended advances, 367.
after notice of subsequent liens, 368.
when mortgagee is not bound to make, 369.
when obligatory, mortgage is a lien from its execution, 370.
the English rule, 371.
mortgage for, not affected by the record of subsequent liens, 372.
mortgage for definite advances has priority, 373.
mortgage need not disclose that it is for, 374.
verbal agreement for, sufficient, 375.
amounts and times of may be shown, 376.
express limitations must be observed, 377.
when only part of the advances are made, 378.
redemption of mortgage given to secure, 1079.

GEORGIA, nature of a mortgage in, 26.
written authority for filling blanks, 90.
vendor's lien abolished, 191.
not assignable, 212.
parol evidence to show a mortgage, 292.
mortgage for future advances in, 366.
provisions respecting mechanics' liens, 490.

GEORGIA — *continued.*
usury in, 633.
entering satisfaction of record, 1001.
no redemption after foreclosure, 1051, 1331.
statute of limitations, twenty years, 1193.
statutory provisions relating to foreclosure, 1331.
power of sale mortgages in, 1732.
GIFT of mortgage, 614, 700.
GRACE allowed on mortgage note, 75.
GUARANTY. (See SURETY.)
Whether assignment carries separate contract of, 830.
does not give right to foreclose until after payment of the principal debt, 1187.
guarantor not proper party to foreclosure suit, 1432.
GUARDIAN may redeem, 1062.

HABENDUM, office of, 67.
in mortgage to a corporation, 67.
HEIRS of mortgagee cannot make an effectual entry to foreclose, 1054.
HOMESTEAD, subject to vendor's lien, 193.
subject to purchase money mortgage, 466.
release of wife obtained by fraud, 626.
included with other realty in mortgage, 731, 1286.
cannot be incumbered except by wife's joining, 91.
acknowledgment of wife required in some states, 538.
as affecting order of foreclosure sale, 1632.
sale under execution does not affect, 665.
none intervenes between discharge of old and taking new mortgage, 927.
revivor or renewal of mortgage as affecting, 949.
holder of may redeem, 1067.
no defence to a writ of entry to foreclose a mortgage, 1286.
whether it makes wife a necessary party to foreclosure suit, 1423.
in surplus proceeds of foreclosure sale, 1693.
HUSBAND, whether necessary party to suit to foreclose mortgage given by his wife, 1424.

IDAHO TERRITORY, provisions respecting registration in, 491.
provisions respecting mechanics' liens in, 491.
usury in, 633.
compound interest not allowed in, 650.
entry of satisfaction of record, 1002.

IDAHO TERRITORY — *continued.*
statute of limitations, five years, 1193.
statutory provisions relating to foreclosure, 1332.
ILLINOIS, nature of a mortgage in, 27.
written authority for filling blanks, 90.
vendor's lien adopted in, 161.
not assignable, 212.
parol evidence to show a mortgage, 293.
provisions respecting registration in, 492.
provisions respecting mechanics' liens in, 492.
usury in, 633.
assignment of debt passes mortgage in, 817.
entry of satisfaction of record, 1003.
redemption after foreclosure, 1051, 1333.
statute of limitations, ten years, 1193.
statutory provisions relating to foreclosure, 1333.
strict foreclosure in, 1545.
power of sale mortgages and trust deeds in, 1733.
IMPROVEMENTS, mortgage of, 146.
mortgage covers, 147.
by mortgagor enure to mortgagee, 681.
mortgagor's tenants not allowed compensation for, 779.
by mortgagee in possession, 1126–1131.
what he may be allowed for, 1127, 1128.
INCOME. (See RENTS AND PROFITS.)
INDEMNITY, description of in mortgage, 379.
general description of sufficient, 380.
limitations must be observed, 381.
mortgage for, a continuing security, 382.
lien from time of execution, 383.
evidence to fix amount secured, 384.
when principal creditor is entitled to the security, 385.
whether surety may release security, 386.
not after liability is fixed, 387.
mortgage, assignment of, 802.
performance of condition of, 887.
discharge of mortgage for, 934, 975.
mortgage for covers successive renewals, 934.
when right of action on accrues, 1213.
conditional judgment upon mortgage for, 1312.
bill to foreclose mortgage of, 1472.
defence that mortgage was given for, 1489.

Reference is to Sections.

INDEX, no part of the record, 553.
damages for errors in, 554.
descriptive, errors in, 555.
INDIANA, nature of a mortgage in, 28.
form of mortgage, 61.
verbal authority to fill blanks, 90.
vendor's lien adopted in, 191.
assignable, 212.
parol evidence to show a mortgage, 294.
record of assignment not notice, 472.
record of assignment not notice to mortgagor, 473.
provisions respecting registration in, 493.
provisions respecting mechanics' lien, 493.
usury in, 633.
assignment of debt passes mortgage, 817.
entry of satisfaction of record, 1004.
redemption after foreclosure, 1051, 1334.
statute of limitations, twenty years, 1193.
statutory provisions relating to foreclosure, 1334.
power of sale mortgages and trust deeds in, 1734.
INDORSEMENTS of payments are merely admissions, 918.
INDORSER, failure to charge does not affect mortgage, 941.
when entitled to foreclose mortgage to indemnify, 1187.
not proper party to suit to foreclose mortgage, 1434.
INFANCY, disability of, 104, 105.
as affecting a purchase money mortgage, 104.
ratification of mortgage voidable for, 105.
certificate of magistrate that wife is of age, 538.
INFORMAL MORTGAGE, may be good in equity, 168.
executed in name of agent, 169.
INJUNCTION against waste by mortgagor, 684.
not against removal of timber cut, 685.
no duty on part of mortgagee to obtain, 686.
against exercise of power of sale, 1801–1820.
INJURY to mortgaged property, mortgagee's right of action for, 695.
INSANITY, disability of, 103.
of mortgagor, defence in foreclosure suit, 1510.
does not revoke power, 1793.
INSTALMENT, foreclosure for, 1459.
decree for, 1577, 1591.
surplus proceeds of sale applied, how, 1707.

INSURANCE, condition to effect, 78.
a contract of indemnity, 396.
interests covered by, 397.
application for should disclose incumbrance, 399.
by mortgagor for benefit of mortgagee, 400.
when no covenant to insure for the benefit of mortgagee, 401.
mortgagee's equitable lien for, 402.
how far others affected by, 403.
valid against mortgagor's assignee in bankruptcy, 404.
statutory provision for in Maine, 405.
loss payable to mortgagee, 406.
equivalent to assignment, 407.
who may sue for, 408.
mortgagee must apply to debt, 409, 1136.
when debt not due, 410.
insurers not subrogated to mortgagee's rights, 411.
agreement to assign to insurers, 412.
acts of owner in derogation of policy, 413.
when mortgagee may charge for insurance, 414, 1135, 1596.
under a condition to insure, 415.
when mortgagee liable as insurer, 416.
return premium, 417.
obtained by mortgagee presumed to be under mortgage, 418.
of mortgagee's interest, not of the debt, 419.
when insurer subrogated, 420.
King v. *State Mut. Fire Ins. Co.* 421.
mortgage not an alienation, 422.
unless by deed absolute, 423.
entry to foreclose, 424.
when title becomes absolute, 425.
alteration of ownership, 426.
assignment of policy with consent, 427.
INTEREST, form of provision to pay, 73, 75, 76.
when rate not named, 74.
increasing rate of, 361.
as shown by record, 565.
rates of in the several states, 633.
compound, whether usurious, 650.
provisions as to in the several states, 650.
while agreement for is executory, 651.
accrued interest is a debt, 652.
coupons for, 653, 1141.

INTEREST — *continued.*
compound, may be enforced as it matures, 654.
computation of, 655.
ceases from time of sufficient tender, 899.
payments appropriated to before principal, 911.
no presumption of payment of, 914.
taking new note for, 932.
rate allowed in stating mortgagee's account, 1141.
when default in payment of authorizes foreclosure, 1176–1178.
payment of prevents running of statute of limitations, 1198.
decree of sale should include, 1594.
INVERSE ORDER, of liability of purchasers of portions of mortgaged premises, 1092.
an equitable rule, 1620.
where the rule prevails, 1621.
rule applies to mortgages, 1622.
record of subsequent deed not notice to mortgagee, 1724.
when mortgage made a common charge, 1625.
contribution according to value, 1626.
valuation as of what time, 1627.
mortgagee having other security, 1628, 1629.
release of part primarily liable, 1631.
when part of premises is a homestead, 1632.
IOWA, nature of a mortgage in, 29.
form of mortgage, 61.
vendor's lien adopted in, 191.
defeated by vendor's conveyance, 198.
vendor's lien by contract how enforced, 239.
parol evidence to show a mortgage, 295.
provisions respecting registration in, 494.
provisions respecting mechanics' liens in, 494.
usury in, 633.
assignment of debt passes mortgage in, 817.
entry of satisfaction of record, 1005.
redemption after foreclosure, 1051, 1335.
statute of limitations, ten years, 1193.
statutory provisions relating to foreclosure, 1335.
strict foreclosure not known in, 1546.
power of sale sale mortgages and trust deeds in, 1735.

JOINT MORTGAGEES, 135.
writ of entry by, to foreclose mortgage, 1283.

JOINT MORTGAGEES — *continued.*
equitable suit to foreclose by, 1381, 1382.
parties to foreclosure suit, 1435.
JUDGMENT, for mortgage debt does not discharge it, 936.
for portion of mortgage debt, 937.
under trustee process payment *pro tanto*, 938.
release of discharges debt, 940.
for the mortgage debt does not waive the right to foreclose, 1218.
recovery of opens foreclosure, 1274.
conditional, in suit to foreclose by writ of entry, 1306–1316.
may be assigned, 1316.
on note or bond no defence to foreclosure suit, 1511.
in foreclosure suit when final, 1600.
For deficiency, 1709–1721.
statutory provisions concerning, 1709.
third person may be joined when, 1710.
court of equity acting without authority of statute, 1711.
if there be no bond or note, 1715.
against non-resident, 1716.
upon decease of mortgagor, 1717.
personal judgment against wife erroneous, 1718.
when it becomes a lien, 1720.
JUDGMENT CREDITOR, may show absolute deed to be a mortgage, 337.
not a purchaser within the recording acts, 460.
mortgagee has priority of, when, 461, 462, 463.
notice of unrecorded mortgage, 582.
may redeem mortgage, 1069.
proper party to foreclosure suit, 1436.
JURISDICTION of suits to foreclose mortgages, 1443.

KANSAS, nature of a mortgage in, 30.
written authority to fill blanks, 90,
vendor's lien repudiated, 191.
parol evidence to show a mortgage, 296.
record of assignment not notice to mortgagor, 473.
provisions respecting registration in, 495.
provisions respecting mechanics' liens in, 495.
entry of satisfaction of record, 1006.
no redemption after foreclosure, 1051, 1336.
statute of limitations, fifteen years, 1193, 1207.

Reference is to Sections.

KANSAS — *continued.*
statutory provisions relating to foreclosure, 1336.
power of sale mortgages and trust deeds in, 1736.
KENTUCKY, nature of a mortgage in, 31.
written authority to fill blanks, 90.
vendor's lien in, 191.
defeated unless stated in deed, 198.
assignable, 212.
parol evidence to show a mortgage, 297.
provisions respecting registration in, 496.
provisions respecting mechanics' liens in, 496.
usury in, 633.
assignment of debt passes mortgage in, 817.
entry of satisfaction of record, 1007.
no redemption after foreclosure, 1051, 1337.
when right to redeem barred in, 1145.
statute of limitations, fifteen years, 1193.
statutory provisions relating to foreclosure, 1337.
strict foreclosure in, 1547.
power of sale mortgages and trust deeds in, 1737.

LAND CONTRACT. (See TITLE BOND.)
LAND GRANT subject to mortgage, 157.
LAW OF PLACE, as regards usury, 656–663.
as regards assignments, 823.
LEASE, mortgage of how foreclosed 1449.
LEASEHOLD ESTATES, mortgage of, within recording acts, 471.
mortgagor in possession entitled to rents, 670.
when mortgagee liable for rent, 785.
mortgagee entitled to the rents, 785.
LESSEE of mortgaged estate, his rights and liabilities, 771–785.
mortgagor in possession not liable for rent, 771.
made before mortgage not affected by it, 773.
mortgage of premises already leased is an assignment of the reversion, 774.
rent accrued does not pass by the assignment, 774.
rights of mortgagee as assignee of the reversion, 774, 775.
of mortgagor after mortgage is subject to it, 776.
attornment by, 777, 778.
mortgagee may treat lessee as trespasser, 777.
tenants not allowed compensation for improvements, 779.
emblements, 780.

LESSEE — *continued.*
no one but mortgagee can take advantage of invalid lease, 781.
provision authorizing mortgagor to bind mortgagee by lease, 782.
lease by mortgagee in possession terminated by redemption, 783.
assignment by mortgagee in possession does not transfer rent due, 784.
for years, not entitled to any part of surplus, 1696.
LIMITATIONS, STATUTE OF.
As affecting vendor's lien by contract, 237.
when mortgage debt barred by, 915.
applies by analogy to right of redemption, 1144.
the statute in force governs, 1145.
special statutes relating to redemption, 1145.
when mortgagee's possession not adverse, 1149.
adverse possession operates against married woman, 1150.
successive disabilities of mortgagor, 1151.
When it begins to run against redemption, 1152.
not while mortgage relation exists, 1152.
under Welsh mortgage, 1153.
when mortgagor retains possession of part, 1155.
runs from time of entry of mortgagee, 1156.
presumption that right is barred after twenty years, 1157.
constructive possession not sufficient, 1158.
when notice to mortgagor necessary, 1159.
when right is barred after imperfect foreclosure, 1161.
What prevents the running of, 1162–1173.
acknowledgment of mortgagee, 1162.
to a third person, 1164.
binding upon all claiming under, 1165.
by rendering account, 1166.
by letter, 1167.
by assignment of mortgage, 1168.
by recital in deed, 1169.
by suit to enforce, 1170.
verbal, 1171.
filing of bill to redeem stops, 1172.
how pleaded, 1173.
When the right to foreclose is barred, 1192–1214.
statute applies to mortgages by analogy, 1192.
tendency to shorten period of, 1193.
presumption of payment after twenty years not conclusive, 1196.

LIMITATIONS, STATUTE OF — *continued.*
presumption repelled by circumstances, 1197.
payment of interest renews, 1198.
by one tenant in common, 1199.
payment of taxes, 1200.
statute does not discharge the debt, 1203.
though debt be barred lien may be enforced, 1204.
in what states rule is otherwise, 1207.
adverse possession by several persons successively, 1208.
lien for purchase money barred when debt is barred, 1209.
statute runs in favor of mortgagor from time mortgagee's right of action accrues, 1210.
possession of mortgagor presumed to be subordinate, 1211.
special statute of limitations, 1214.
defence of, in bill to foreclose, 1509.
LIS PENDENS, doctrine of as regards registration and notice, 599.
as regards new parties in interest, 1411, 1442.
LOSS OF MORTGAGE, decree for making a new one, 100.
LOUISIANA, notice of a mortgage in, 32.
provisions respecting registration in, 497.
usury in, 633.
compound interest cannot be recovered, 650.
assignment of debt passes mortgage in, 817.
entry of satisfaction of record, 1008.
no redemption after foreclosure, 1051, 1338.
statutory provisions relating to foreclosure, 1338.
power of sale mortgages and trust deeds in, 1738.
LUMPING SALES. (See SALES IN PARCELS.)

MAINE, nature of a mortgage in, 33.
verbal authority to fill blanks, 90.
vendor's lien repudiated in, 191.
parol evidence to show a mortgage, 298.
statutory provisions as to insurance, 405.
provisions respecting registration in, 498.
provisions respecting mechanics' liens in, 498.
usury in, 633.
assignment of debt without mortgage in, 817.
entry of satisfaction of record, 1009.
redemption after entry to foreclose, 1051, 1339.
statute of limitations, twenty years, 1193.
provisions respecting foreclosure by entry and possession, 1239, 1240.

MAINE — *continued.*
writ of entry to foreclose mortgage, 1276, 1277.
statutory provisions relating to foreclosure, 1339.
power of sale mortgages and trust deeds in, 1739.
MARRIED WOMAN, description of in mortgage, 63.
acknowledgments by, 83.
disability of at common law, 106.
coverture does not remove disability of infancy, 106.
liability of in equity for her contracts, 107.
English rule of liability of her property, 108.
American rule, 109.
can bind herself personally on what contracts, 110.
liability of for a deficiency after foreclosure, 111.
doctrine of her liability for her general debts, 112.
her mortgage to secure husband's debt, 113.
when a surety for her husband, 114, 949.
may assume a mortgage, 116, 753.
may take mortgages, 133.
bound by lien reserved in deed to, 231.
mortgage of, obtained by duress or fraud, 626.
entitled to the benefit of payments on her mortgage, 949.
equitable assignment of mortgage by, 813.
holding mortgage, may foreclose, 1393.
wife of mortgagor party to foreclosure suit, 1420–1422.
not liable to personal judgment for deficiency, 1718.
may confer a valid power of sale, 1777 *a.*
MARSHALLING ASSETS, as between different creditors, 875.
when mortgagee has other security, 1628, 1629.
when mortgagee holds two mortgages, 1630.
after release by mortgagee of part primarily liable, 1631.
MARYLAND, nature of a mortgage in, 34.
form of mortgage, 61.
written authority to fill blanks, 90.
vendor's lien adopted, 191.
not assignable, 212.
parol evidence to show a mortgage, 299.
record of assignments provided for, 472.
provisions respecting registration in, 499.
provisions respecting mechanics' liens in, 499.
usury in, 633.
entry of satisfaction of record, 1010.
no redemption after foreclosure, 1051, 1340.

MARYLAND — *continued.*
statutory provisions relating to foreclosure, 1340.
power of sale mortgages and trust deeds in, 1740.
MASSACHUSETTS, nature of a mortgage in, 35.
form of mortgage, 60.
written authority to fill blanks, 90.
vendor's lien repudiated, 191.
parol evidence to show a mortgage, 300.
provisions respecting registration in, 500.
provisions respecting mechanics' liens in, 500.
usury in, 633.
assignment of debt without mortgage in, 817.
entry of satisfaction of record, 1011.
redemption after entry to foreclose, 1051, 1341.
statute of limitations, twenty years, 1193.
provisions respecting foreclosure by entry and possession, 1244.
writ of entry to foreclose mortgage, 1276, 1277.
statutory provisions relating to foreclosure, 1341.
power of sale mortgages and trust deeds in, 1741.
MECHANIC'S LIEN, vendor reserving legal title not affected by, 227.
subject to purchase money mortgage, 466.
mortgage for obligatory advances has precedence, 370.
purchase money mortgage has precedence, 509, *note*, 568.
attempt to defeat by fraudulent mortgage, 628.
mortgage executed before commencement of building has precedence of, 609.
general view of statutes affecting priority of mortgages, 479 *a.*
from commencement of the work, 479 *a.*
what the commencement of a building is, 509, *note*, 479 *a.*
commencement of alteration, 479 *a.*
for repairs not paramount to existing mortgage, 479 *a.*
proof requisite to establish, 479 *a.*
upon building distinct from land, 479 *a.*
synopsis of the statutes of the several states, 480, 481–526, *notes.*
MERGER, doctrine of, 848–873.
at law and in equity, 848.
none on assignment to co-tenant, 849.
none on assignment to wife of mortgagor, 850.
none on marriage of mortgagor and mortgagee, 851.
none when equitable estate has been extinguished, 852.
when assignee is estopped to claim, 853.
estopped by selling the estate free of incumbrances, 854.

MERGER — *continued.*
intention governs as to, 855.
intention expressed, 856.
intention expressed against merger, 857.
a release may operate as assignment, 858.
deed of quitclaim from mortgagee, 859.
bequest of mortgage to mortgagor, 860.
parol evidence of intention, 861.
in new security or judgment, 862.
mortgage will not be kept alive to aid in a wrong, 863.
when debt is paid by one bound to pay it, 864.
when mortgage assigned to one who has assumed it, 865.
with reference to right of dower, 866.
payment by one who has warranted against incumbrances, 867.
assignment to subsequent purchaser, 868.
payment by purchaser, 869.
acquisition of equity of redemption by mortgagee, 870.
mortgagee purchasing and giving up note, 871.
purchaser cannot rely upon record as showing, 872.
whether extinguishment of equity or merger of mortgage, 873.
merger of note in judgment does not extinguish debt, 936.
MICHIGAN, nature of a mortgage in, 36.
vendor's lien adopted in, 191.
parol evidence to show a mortgage, 301.
record of assignment not notice to mortgagor, 473.
provisions respecting registration in, 501.
provisions respecting mechanics' liens in, 501.
usury in, 633.
compound interest allowed in, 650.
assignment of debt passes mortgage in, 817.
tender of payment discharges debt in, 893.
entry of satisfaction of record, 1012.
redemption after foreclosure, 1051, 1342.
statute of limitations, fifteen years, 1193.
statutory provisions relating to foreclosure, 1342.
power of sale mortgages and trust deeds in, 1742.
MINNESOTA, nature of mortgage in, 37.
vendor's lien adopted in, 191.
parol evidence to show a mortgage, 302.
record of assignment not notice to mortgagor, 473.
provisions respecting registration in, 502.
provisions respecting mechanics' liens in, 502.

Reference is to Sections.

MINNESOTA — *continued.*
usury in, 633.
entry of satisfaction of record, 1013.
redemption after foreclosure, 1051, 1343.
statute of limitations, ten years, 1193.
statutory provisions relating to foreclosure, 1343.
strict foreclosure in, 1548.
power of sale mortgages and trust deeds in, 1743.
MISSISSIPPI, nature of mortgage in, 38.
written authority to fill blanks, 90.
power of married woman to mortgage, 118.
vendor's lien adopted in, 191.
parol evidence to show a mortgage, 303.
provisions respecting registration in, 503.
provisions respecting mechanics' liens in, 503.
usury in, 633.
assignment of debt passes mortgage in, 817.
entry of satisfaction of record, 1014.
no redemption after foreclosure, 1051, 1344.
when right to redeem barred in, 1145.
statute of limitations in, 1193.
statutory provisions relating to foreclosure, 1344.
power of sale mortgages and trust deeds in, 1744.
MISSOURI, notice of a mortgage in, 39.
form of mortgage, 61.
vendor's lien adopted in, 191.
not assignable, 212.
parol evidence to show a mortgage, 304.
provisions respecting registration in, 504.
provisions respecting mechanics' liens in, 504.
usury in, 633.
compound interest allowed in, 650.
assignment of debt passes mortgage in, 817.
entry of satisfaction of record, 1015.
no redemption after foreclosure, 1051, 1345.
statute of limitations, ten years, 1193.
statutory provisions relating to foreclosure, 1345.
strict foreclosure not allowed in, 1549.
power of sale mortgages and trust deeds in, 1745.
MISTAKES, in drawing mortgage, 97.
in describing debt, 354.
discharge made by, 966–971.

MISTAKES — *continued.*
only mistake of fact in making discharge entitles one to relief, 699.
in making discharge when assignment was intended, 970.
in substituting new mortgage when there was an intervening lien, 971.
when ground for setting aside foreclosure sale, 1675.
in advertisement of sale, 1851.
MONTANA TERRITORY, nature of a mortgage in, 39 *a.*
provisions respecting registration in, 505.
provisions respecting mechanics' liens in, 505.
usury in, 633.
entry of satisfaction of record, 1016.
statute of limitations, three years, 1193.
statutory provisions relating to foreclosure, 1346.
power of sale mortgages and trust deeds in, 1746.
MORTGAGE, at law and in equity, 8–16, 59.
common law doctrine of, 11.
not a mere security, 12.
the different theories of, 14.
practical distinctions between, 15.
definition of, 16.
nature of in the different states, 17–59.
form of, 60.
description of the parties, 63.
consideration named in, 64.
description of premises, 65.
uncertainty in description, 66.
habendum in, 67.
covenant in, 68.
condition in, 69.
description of debt secured, 70.
sealing is essential, 81.
signing is requisite, 81.
witness to, 82.
acknowledgment of, 83.
delivery of essential, 84.
subsequent acceptance of, 85.
executed to be sold, when a lien, 86.
date of, 89.
filling blanks after execution of, 90.
alteration of, 94, 95.

MORTGAGE — *continued.*
cannot be varied by parol, 90.
reforming a mortgage, 97–99.
principles of construction, 101.
legal capacity to execute, 102.
of partnership real estate, 119–123.
by corporation, 124–128.
who may make, 102–130.
who may take, 131–135.
what may be the subject of, 136–161.
of a mortgage, 138, 139.
of rents, 140.
of building may pass the land, 142.
statutory, 178.
by absolute deed and agreement to reconvey, 241–281.
distinguished from conditional sale, 241–281.
cannot be shown by parol to have been intended as sale, 277.
distinguished from a trust, 281, 332.
parol evidence to prove, 282–342.
the debt secured by, 343–395.
redelivery of for new obligation, 362.
to secure future advances, 364–378.
of indemnity, 379–387.
for support, 388–395.
not an alienation within terms of insurance policy, 422.
what fixtures covered by, 428–452.
registration of, 456–569.
for purchase money, 464, 466.
void and voidable, 610–632.
usurious, 633–663.
before foreclosure is personal assets, 700.
of premises leased is an assignment of the reversion, 774.
for support, assignment of, 803.
assignment of without debt, 805.
payment of, 886–942.
revivor of, 943–949.
foreclosure of is not payment, 950–955.
who may receive payment of, 956–965.
discharge of, 956–1037.
redemption of, 1038–1113.
when right to redeem is barred, 1144–1173.
when right to foreclosure accrues, 1174–1191.

MORTGAGEE, at common law has legal estate, 11.
his right of possession in the several states, 17–59.
filling in name after execution, 90, 91.
insurable interest of, 397.
equitable lien of, upon insurance, 402.
loss payable to, 406–410.
when liable as insurer, 416.
insurance obtained by, 418–421.
a purchaser within the recording acts, 458.
but not when the mortgage secures a preëxisting debt, 458.
further time is a good consideration, 458.
mortgagor's possession not adverse to, 672.
not liable to ejectment by mortgagor, 674.
not liable to trespass by mortgagor, 675.
mortgagor's personal liability to, 677.
right of action for waste, 687–691.
remedy of, for injury by mortgagor, 695.
remedy for wilful injury done the security, 696.
His rights and liabilities, 699–734.
not in general sense owner of the property, 699.
his interest personal assets, 700.
cannot be levied upon or attached, 701.
when entitled to possession, 702.
cannot be disseised by mortgagor, 703.
joint tenancy, 704.
when may have partition, 705.
when bound by partition between mortgagors, 706.
His rights against mortgagor, 707–721.
entitled to whole security, 707.
entitled to an award of damages to property, 708.
an essential party to proceedings affecting his rights, 709.
a purchaser to extent of his claim, 710.
may purchase mortgagor's equity, 711.
although in possession, 712.
limitation of this right, 713.
acquiring tax title, 714.
cannot be divested of possession until payment, 715, 716.
rule otherwise in Michigan, 717.
writ of entry by, 718.
ejectment by, 718.
forcible entry and detainer by, 720.
trespass for mesne profits, 721.

MORTGAGEE — *continued.*

His liability to third persons, 722–734.

for releasing part of security, 722.

what notice of other's rights affects, 723.

cannot release to prejudice of surety, 724.

nor to prejudice of junior mortgagee, 725.

principal creditor entitled to surety's mortgage, 726.

for release of mortgagor from liability, 726.

for application of other security, 728.

proof of claim in bankruptcy, 729.

cannot change terms of mortgage as against, 730, 732.

when homestead is included in mortgage, 731.

junior mortgagee's rights, 725, 730, 732, 733, 756.

when estopped to assert mortgage, 734.

when entitled to rents of mortgaged premises, 772–775.

lease by mortgagee in possession, 783.

whether liable for rent of leasehold estate, 785.

whether he can be compelled to assign on payment, 792, 793.

legal interest of after assignment, 818, 819.

purchasing equity of redemption, when a merger, 871.

junior may redeem, 1064.

liability to account for rents and profits, 1114–1143.

his remedies for enforcing mortgage, 1215–1236.

Buying at foreclosure sale under decree, 1636.

generally no objection to, 1636.

no deed necessary to pass title, 1660.

court more ready to open sale, 1671.

Buying under power of sale, 1876–1888.

generally not allowed to buy, 1876.

purchase voidable though no fraud be shown, 1877.

rule applies to mortgagee's solicitor, 1878.

or agent, 1879.

less strictness than in case of trustee, 1881.

no restriction when the sale is judicial, 1882.

provision in mortgage enabling, 1883.

rule has no application to subsequent mortgagee, 1884.

right to avoid waived by delay, 1885.

MORTGAGOR, the legal owner except as to the mortgagee, 11.

where his interest is regarded as the legal estate, 13.

provision for his retaining possession, 80.

when estopped to take advantage of irregular execution, 92.

cannot renounce right of redemption in mortgage, 251.

MORTGAGOR — *continued.*
interest of insurable, 397.
how long it remains so, 398.
insurance by, for benefit of mortgagee, 400.
his rights and liabilities, 664–698.
his right of possession as against third persons, 664.
his equity of redemption may be sold on execution, 665.
his widow entitled to dower in equity of redemption, 666.
his right of possession against mortgagee, 667.
may be implied when, 668.
as modified by statute, 669.
his right to rents and profits, 670.
whether liable to mortgagee for rent, 671.
his possession not adverse to mortgagee, 672.
remedy of to recover possession from mortgagee, 673.
cannot maintain ejectment against mortgagee, 674.
cannot maintain trespass against mortgagee, 675.
has perfect right to convey his equity, 676.
his personal liability to mortgagee, 677.
no covenant to pay implied, 678.
subsequently acquired title of, 679.
cannot set up tax title, 680.
his improvements are subject to mortgage, 681.
is estopped to deny his title, 682.
when estopped to deny validity of mortgage, 683.
waste by may be restrained, 684–696.
his removal of timber already cut, 685.
when replevin for timber cut may be had, 688.
may have license to cut wood, 692.
his abuse of license to cut wood, 693.
his right to wood for his own fires, 694.
liability of, to action for injury to property, 695, 696.
his right to emblements, 697.
may waive right to emblements, 698.
release from personal liability, 727.
in possession entitled to the rents, 771, 1120.
lease by, after mortgage, 776.
not bound by stipulation not to redeem, 1039.
MORTUUM VADIUM, 2, 4.

NATIONAL BANKS prohibited from taking mortgages except for prior indebtedness, 134.

Reference is to Sections.

NATURE OF A MORTGAGE, 1–59.
at law and in equity, 8–16.
in the different states, 17–59.
NEBRASKA, nature of a mortgage in, 40.
parol evidence to show a mortgage, 305.
record of assignment not notice to mortgagor, 473.
provisions respecting registration in, 506.
provisions respecting mechanics' liens in, 506.
usury in, 633.
entry of satisfaction of record, 1017.
no redemption after foreclosure, 1051, 1347.
statute of limitations, ten years, 1193.
mortgage barred when debt barred, 1207.
statutory provisions relating to foreclosure, 1347.
strict foreclosure in, 1550.
power of sale mortgages and trust deeds in, 1747.
NEGLIGENCE, as affecting priority, 604.
is not fraud but evidence of it, 604.
in cancelling a mortgage and taking a new one, 605.
in taking one of several notes secured, 606.
NEVADA, nature of a mortgage in, 41.
parol evidence to show a mortgage, 306.
provisions respecting registration, 507.
provisions respecting mechanics' liens in, 507.
usury in, 633.
entry of satisfaction of record, 1018.
redemption after foreclosure, 1015, 1348.
statute of limitations, four years, 1193.
mortgage barred when debt barred, 1207.
statutory provisions relating to foreclosure, 1348.
power of sale mortgages and trust deeds in, 1748.
NEW HAMPSHIRE, nature of a mortgage in, 42.
vendor's lien in, 191.
parol evidence to show a mortgage, 307.
mortgage for future advances in, 366.
mortgage for support, how regarded, 388.
provisions respecting registration in, 508.
provisions respecting mechanics' liens in, 508.
usury in, 633.
assignment of debt passes mortgage, 817.
entry of satisfaction of record, 1019.
redemption after entry to foreclose, 1051, 1349.

NEW HAMPSHIRE — *continued.*
statute of limitations, twenty years, 1193.
provisions for foreclosure by entry and possession, 1241–1243.
writ of entry to foreclose mortgage, 1278.
statutory provisions relating to foreclosure, 1349.
power of sale mortgages and trust deeds in, 1749.
NEW JERSEY, nature of a mortgage in, 43.
vendor's lien adopted in, 191.
parol evidence to show a mortgage, 308.
provisions respecting registration in, 509.
provisions respecting mechanics' liens in, 509.
usury in, 633.
rules as to tender of payment in, 892.
entry of satisfaction of record, 1020.
no redemption after foreclosure, 1051, 1350.
when right to redeem barred in, 1145.
statute of limitations, twenty years, 1193.
statutory provisions relating to foreclosure, 1350.
power of sale mortgages and trust deeds in, 1750.
NEW MEXICO TERRITORY, nature of a mortgage in, 43 *a*.
provisions as to registration in, 510.
provisions respecting mechanic's liens in, 510.
usury in, 633.
entry of satisfaction of record, 1021.
NEW PARTIES may be joined in foreclosure suit, 1442.
NEW PROMISE to take mortgage out of statute of limitations, 1196.
NEW YORK, nature of a mortgage in, 44.
vendor's lien adopted in, 191.
not assignable, 212.
parol evidence to show a mortgage, 309.
record of assignment not notice to mortgagor, 473.
provisions respecting mechanics' liens in, 511.
usury in, 633.
assignment of debt passes mortgage in, 817.
tender of payment discharges debt in, 893.
entry of satisfaction of record, 1022.
no redemption after foreclosure, 1051, 1351.
redemption barred in ten years in, 1147.
statute of limitations, twenty years, 1193.
statutory provisions relating to foreclosure, 1351.
strict foreclosure in, 1551.
power of sale mortgages and trust deeds in, 1751.

NORTH CAROLINA, nature of a mortgage in, 45.
written authority to fill blanks, 90.
vendor's lien denied in, 191.
parol evidence to show a mortgage, 310.
provisions respecting registration in, 512.
provisions respecting mechanics' liens in, 512.
doctrine of notice under the registry laws, 573.
usury in, 633.
assignment of debt passes mortgage in, 817.
entry of satisfaction of record, 1023.
no redemption after foreclosure, 1051, 1352.
when right to redeem barred in, 1145.
statute of limitations, ten years, 1193.
statutory provisions relating to foreclosure, 1352.
strict foreclosure in, 1552.
power of sale mortgages and trust deeds in, 1752.
NOTE secured construed with mortgage, 71.
parol evidence to identify, 71, 352.
secured by express lien, order of payment, 236.
description of all particulars not necessary, 350.
is evidence of amount of debt, 351.
not essential to a mortgage, 353.
renewal does not affect security, 355.
assignment of mortgage without, 804–807, 817–822.
negotiable before due not subject to equities, 834.
overdue subject to equities, 841.
substituted in place of original note secured, 925–927.
incorporating additional loan in new note, 930.
new note for different amount, 931.
new note for interest, 932.
consideration of new note, 933.
renewal of note for which mortgage is indemnity, 934.
surrender of, 983.
should be produced in foreclosure suit, 1308.
renewal of should be alleged in bill to foreclose, 1468.
proof of in foreclosure suit, 1469.
NOTICE, of partnership equities, 119.
of vendor's lien, 204.
by recitals in deed, 205.
purchase without, 206.
of separate defeasance by record, 254.
by possession, 255, 600.

NOTICE — *continued.*
by registration, 456–569.
takes effect from filing deed for record, 542.
record is constructive, 557.
of contents of deed, 557–563.
subsequent records are not, to prior mortgagee, 562, 723.
As affecting priority, 570–609.
under the registry acts, 507–577.
ground of, 570.
policy of, 571.
doctrine of, 572.
exception in some states, 573.
practical effect of, 574.
examination of record, 576.
of secret trust, 577.
different kinds of, 578.
Actual, 579.
degrees of actual, 580.
has effect if received before completion of trade, 581.
one with, may acquire good title from one without, 582.
one without, may require good title from one with, 583.
Implied, 584–590.
notice to principal, from notice to agent, 584.
upon what principle doctrine rests, 585.
must be in same transaction, 586.
must be matter material to transaction, 587.
when agent is employed by both parties, 588.
when agent is a party, 589.
Constructive, 591–598.
is imputed on ground of fraud or negligence, 592.
of existence of lien without particulars, 593.
from recitals in deeds, 594.
recital that premises are subject to a mortgage, 595.
what sufficient to put upon inquiry, 596.
from conveyance, subject to mortgage, 597.
Lis pendens, what is, 599.
possession is, how far, 600.
occasional or temporary, 601.
what affects mortgagee, 723.
assignee should give notice to mortgagor, 791.
of payment not required, 890, 1071.
of foreclosure sale under decree of court, 1612.

NOTICE — *continued.*
want of, under power, no ground for enjoining sale, 1810.
Personal, of sale under power. (See POWER OF SALE MORTGAGES, &c., 1821–1827.)
Under power of sale, publication of, 1828–1839.
what notice should contain, 1839–1856.

OHIO, nature of a mortgage in, 46.
written authority to fill blanks, 90.
vendor's lien adopted in, 191.
not assignable, 212.
parol evidence to show a mortgage, 311.
provisions respecting registration in, 513.
provisions respecting mechanics' liens in, 513.
doctrine of notice under the registry laws, 573.
usury in, 633.
assignment of debt passes mortgage in, 817.
entry of satisfaction of record, 1024.
no redemption after foreclosure, 1051.
statutory provisions relating to foreclosure, 1353.
strict foreclosure in, 1553.
power of sale mortgages and trust deeds in, 1753.
ONCE A MORTGAGE ALWAYS A MORTGAGE, 7, 340.
when rule not applicable, 247.
OPENING BIDDINGS at foreclosure sale, 1640.
ORDER OF SALE. (See INVERSE ORDER OF SALE, 1091, 1092, 1620–1632.)
decree should provide for, 1576.
OREGON, nature of a mortgage in, 47.
vendor's lien adopted in, 191.
record of assignment not notice to mortgagor, 473.
provisions respecting registration in, 514.
provisions respecting mechanics' liens in, 514.
usury in, 633.
entry of satisfaction of record, 1025.
redemption after foreclosure, 1051, 1354.
statutory provisions relating to foreclosure, 1354.
power of sale mortgages and trust deeds in, 1754.
OVERPAYMENT, may be recovered, 903.
to prevent foreclosure, 1085.

PARCELS. (See SALE, 1616–1619.)

Reference is to Sections.

PAROL AGREEMENT to vary terms, 96.
PAROL AUTHORITY to fill blanks, 90, 91.
PAROL EVIDENCE, as to existence of vendor's lien, 196.
to connect deed and separate defeasance, 248.
to show a conditional sale, 277.
To prove an absolute deed a mortgage, 282–342.
there must be equitable grounds, 283.
the doctrine in England, 284.
the doctrine in the United States courts, 285.
the doctrine in the several states, 286–321.
fraud, accident, and mistake, as grounds for admission of, 321.
intention as ground for admission of, 321.
the statute of frauds does not stand in way, 322.
grantor not estopped to show character of conveyance, 323.
what facts are considered, 324.
evidence of continuance of debt, 325.
when there was a preëxisting debt, 326.
when application was for a loan, 327.
continued possession of grantor, 328.
inadequacy of price, 329.
strict proof required, 335.
To identify note secured, 71, 352.
to fix amount secured by indemnity mortgage, 384.
that an assignment was intended as a discharge, 861.
does not affect mortgagee's lien upon residue, 722.
effect of as to subsequent purchasers, 723.
effect of as to surety, 724, 726.
PARTIAL PAYMENTS, provision for, 79.
application of, to usurious mortgage, 912.
PARTIAL RELEASE, covenant to make, effect of, 79, 981.
effect when mortgagee has notice of subsequent incumbrances, 982.
PARTIES to a mortgage, description of, 63.
who may make a mortgage, 102.
to what proceedings mortgagee an essential party, 709.
To a bill to redeem, 1097–1103.
PARTIES TO AN EQUITABLE SUIT FOR FORECLOSURE, general principles, 1369.
Proper parties plaintiff, 1368–1393.
all interested in mortgage should be, 1368.
joinder of plaintiffs, 1369.

Reference is to Sections.

PARTIES TO AN EQUITABLE SUIT, ETC. — *continued.*
real party in interest, 1370.
must have some interest, 1371.
assignee by informal assignment, 1372.
after absolute assignment, 1373.
after assignment as collateral, 1374.
assignee for collateral security, 1375.
assignee of mortgage without bond or note, 1376.
assignee of mortgage note, 1377.
holder of one of several notes secured, 1378.
partner, 1379.
surety, 1380.
joint mortgagee, 1381.
survivor of joint mortgagees, 1382.
nominal trustee, 1383.
Cestui que trust, 1384.
bondholders, 1385.
trustee for creditors, 1386.
executor or administrator of mortgagee, 1387, 1388.
foreign executor or administrator, 1389.
mortgage to executor, 1390.
holder of two or more mortgages, 1391.
mortgage to person in official capacity, 1392.
wife holding mortgage as her separate property, 1393.
Necessary or proper parties defendant, 1394–1442.
general principles, 1394.
omission of party in interest does not make sale void, 1395.
all persons in interest should be joined, 1396.
trustees and beneficiaries, 1397.
when beneficiaries are numerous, 1398.
trustee, 1399.
equitable interest, 1400.
remainder-men, 1401.
mortgagor a necessary party, 1402.
when he retains any interest, 1403.
when not a necessary party, 1404.
when he has conveyed a portion of the premises, 1405.
holder of equity of redemption a necessary party, 1406.
purchaser who has assumed a mortgage, 1407.
mesne purchaser, 1408.
tenants in common, 1409.
objection to non-joinder when taken, 1410.

PARTIES TO AN EQUITABLE SUIT, ETC. — *continued.*
purchaser *pendente lite*, 1411.
when deed to purchaser has not been recorded, 1412.
a mere occupant, 1413.
heirs of mortgagor, 1414, 1417.
heir of purchaser, 1415.
heirs of partner, 1416.
devisees, 1418.
legatees, 1419.
mortgagor's wife, 1420.
when wife did not join in mortgage, 1421.
when there is no dower, 1422.
wife's homestead, 1423.
husband, 1424.
all subsequent mortgagees, 1425.
mortgagee who has assigned without the note, 1426.
assignee of note, 1427.
personal representative of junior mortgagee, 1428.
parties who make default cannot complain, 1429.
junior mortgagee who has received payment, 1430.
redemption only remedy of one not made a party, 1431.
guarantor not a proper party, 1432, 1433.
indorser of note, 1434.
joint mortgagees, 1435.
judgment creditors, 1436.
judgment after decree, 1437.
bankruptcy as affecting, 1438.
prior parties in interest, 1439.
adverse claimants, 1440.
priority between mortgages, 1441.
new parties, 1442.
To bill for strict foreclosure, 1557.
heirs of mortgagee necessary parties, 1559.
PARTITION, when mortgagees may have, 705.
between mortgagors, when mortgagee bound by, 706.
in case of a mortgage of one of several parcels held in common 706.
PARTNERSHIP REAL ESTATE, mortgage of, 119-123.
mortgage by one partner of his interest, 120.
mortgage by one partner for partnership debt, 121.
mortgage of private property for partnership debt, 122.
assignment of mortgage by, 800.

PART-OWNER of equity of redeem, 1063.
PAYMENT, produces a merger when, 848–869.
by one who has assumed the mortgage, 865.
by one who has warranted against incumbrances, 867.
by purchaser of equity of redemption, 869.
by one not under obligation to make it operates as subrogation, 877.
by mortgagee for his own protection subrogates him, 878.
at the law day discharges the incumbrance, 886.
and revests the estate, 887.
cannot be enforced before the law day, 888.
after condition broken does not revest the estate, 889.
notice of, required by custom in England, 890, 1071.
but not in this country, 890.
of more than is due may be recovered, 903.
Appropriation of, 904–912.
of intention, 904.
deposit of amount without appropriation, 905.
debtor may appropriate to any account, 906.
when presumed to be made on mortgage debt, 907.
when creditor may make appropriation, 908.
appropriation binding on subsequent incumbrancers, 908.
what is a sufficient appropriation, 909.
agreement to apply in discharge of a portion of the land, 909 *a*.
appropriation of insurance money, 910.
interest to be paid first, 911.
upon usurious mortgage, 912.
Presumption and evidence of payment, 913–918.
from possession of mortgage note, 913.
from conduct of mortgagee, 913.
presumption of payment of interest, 914.
presumption from lapse of time, 915.
presumption from shorter period than twenty years, 916.
is a question of fact, 917.
indorsements are admissions, 918.
By accounting as administrator, 919–923.
when mortgagor comes into possession of mortgage, 919.
mortgagor's dealing with the mortgage, 920.
purchase of mortgage by executor, 921.
mortgagee administrator of mortgagor's estate, 922.
bond by heir to pay debt, 923.

PAYMENT — *continued.*

Changes in form of debt, 924–942.

no change in form discharges, 924.
new note not a discharge as to subsequent purchaser, 925.
intention generally controls, 926.
intention a question of fact, 926.
substitution of another note, 927.
giving up of bond of defeasance, 928.
taking further security, 929.
incorporating additional loan in new note, 930.
new note for different amount payable at a different time, 931.
new note for interest, 932.
consideration of new note, 933.
renewal of note for which mortgage is indemnity, 934.
dishonored check or bill of exchange, 935.
merger in judgment does not extinguish, 936.
judgment for a portion of the debt, 937.
judgment under trustee process, 938.
proceedings against mortgagor personally, 939.
release of judgment, 940.
failure to charge in dower, 941.
extension of time of payment, 942.

Revivor of mortgage, 943–949.

mortgage becomes *functus officio* after, 943.
when the rights of third persons have not intervened, 944.
assignment to third person at request of mortgagor, 945.
redelivery of note, 946.
same formalities necessary as in first instance, 946.
verbal agreement to continue for another debt, 947.
as against other parties in interest, 948.
as against wife when she is surety, 949.

Foreclosure does not constitute, 950–955.

mortgagee may recover any balance, 950.
whether the foreclosure is strict or not, 950.
release of equity of redemption to mortgagee, 951.
when foreclosure is by entry and possession, 952.
foreclosure sale is payment *pro tanto*, 953.
when the sale is voidable, 953.
purchase of equity by mortgagee on execution, 954.
purchase under tax sale by mortgagor, 955.

PAYMENT — *continued.*

Who may receive payment, 956–965.

the person to whom the debt is due, 956.
note or bond should be produced, 956.
discharge by person not entitled to make, 957.
when mortgage is held by two or more jointly, 958.
one of two executors may receive, 959.
trustees must generally act jointly, 959.
whether foreign executor can make valid discharge, 960.
an assignee of mortgage may receive, 961.
mortgagee after assignment cannot receive, 961.
equitable assignee may receive, 962.
one holding mortgage as collateral may receive, 963.
agency inferred from possession of securities, 964.
when attorney is authorized to receive, 964.
receiver may take payment, 965.

Discharge by release or of record, 970–991.

after payment mortgagee holds title in trust, 973.
general release from all claims, 976.
release may be limited, 980.
effect of partial release, 982.
personal liability may be released, 983.
release of security not necessarily a release of the debt, 984.
release wrongfully obtained, 987.

presumption of payment after twenty years, 1192.
presumption of, repelled how, 1196–1202.
discharges both lien and debt, 1219.
foreclosure by entry and possession is payment *pro tanto*, 1264.
a defence to foreclosure, 1298.
strict foreclosure does not work, 1567.
from proceeds of foreclosure sale, 1682–1708.

PENNSYLVANIA, nature of a mortgage in, 48.
authority to fill blanks, 90.
vendor's lien denied in, 191.
parol evidence to show a mortgage, 312.
mortgage for support how regarded, 388.
record of assignment is notice in, 472.
provisions respecting registration in, 515.
provisions respecting mechanics' liens in, 515.
usury in, 633.
assignment of debt passes mortgage in, 817.
entry of satisfaction of record, 1026.

PENNSYLVANIA — *continued.*
redemption after foreclosure, 1051, 1355.
statute of limitations, twenty-one years, 1143.
statutory provisions relating to foreclosure, 1355.
power of sale mortgages and trust deeds in, 1755.
PLEADINGS AND PRACTICE, in bills to redeem, 1093–1113.
in writ of entry to foreclose, 1293–1295.
in equitable suit to foreclose, 1451–1515.
POSSESSION of mortgagor how far notice, 255.
in general how far notice, 600.
temporary or equivocal not notice, 601.
Mortgagor's right of, 80, 664.
as against mortgagee, 667.
may be implied, 668.
modified by statute, 669.
not adverse to mortgagee, 672.
remedy to recover of mortgagee, 673.
when mortgagee entitled to, 702, 703.
mortgagee cannot before payment be divested of, 715.
mortgagee obtaining, may retain, 716.
otherwise in Michigan, 717.
mortgagee may maintain writ of entry for, 718.
of mortgagor does not prevent assignment, 789.
of mortgagor presumed to be subordinate, 1211.
delivery of under decree of strict foreclosure, 1562.
delivery of to purchaser under foreclosure sale, 1663–1667.
POWER OF ATTORNEY to execute a mortgage, 129.
whether general power authorizes power of sale mortgage, 129.
how exercised in making a mortgage, 130.
requirement that power be recorded, 547.
when it operates as an assignment of mortgage, 816.
POWER OF SALE IN MORTGAGES AND TRUST DEEDS.
May be conferred by statute, 61.
whether authorized under a general power to mortgage, 129.
passes by an equitable assignment of mortgage, 826.
need not be exercised before suit for debt, 1221.
Statutory provisions concerning, 1722–1763.
statutory power of sale in England, 1722.
in Virginia, 1722,
provisions in the several states, 1723–1763.
Nature and use of powers of sale, 1764–1772.
advantages over foreclosure in equity, 1764.

POWER OF SALE IN MORTGAGES, ETC. — *continued.*
validity of, questioned in early cases, 1765.
regarded in England as a necessary incident, 1766.
when first used in this country, 1767.
whether a necessary incident of a mortgage, 1768.
deeds of trust in legal effect mortgages, 1769.
why preferred by some, 1770.
trustee in, is agent of both parties, 1771.
debt belongs to beneficiary, 1772.
Power of sale a cumulative remedy, 1773–1776.
does not exclude foreclosure in equity, &c., 1773.
court of equity may enforce trust deed, 1774.
sale is by virtue of the power, not of the decree, 1775.
when debt is unliquidated, 1776.
Construction of power, 1777–1791.
power may be in form of power of attorney, 1777.
parties may make such regulations as they desire, 1778.
what is a sufficient power, 1779.
acceptance of trus,t 1780.
obvious error on face of power, 1781.
prior entry when necessary, 1782.
prior entry does not prevent sale, 1783.
record of mortgage or power, 1784.
who may exercise power, 1785.
may be executed by administrator of mortgagee, 1786.
legal assignment of mortgage passes the power, 1787.
otherwise with deed of trust, 1788.
equitable assignee cannot execute power, 1789.
power to two or more jointly must be executed by all, 1790.
a first and second mortgagee may concur in sale, 1791.
Revocation and suspension of power, 1792–1800.
death of mortgagor does not revoke, 1792.
power is coupled with an interest, 1792.
insanity of mortgagor does not revoke, 1793.
rule the same where the mortgage is a mere security, 1794.
may be modified and extended without revoking, 1795.
conveyance by mortgagee of part of premises, 1796.
pendency of bill to redeem does not suspend, 1797.
tender after breach does not defeat, 1798.
rule in England as to, 1799.
rule in New York as to, 1799.

POWER OF SALE IN MORTGAGES, ETC. — *continued.*

payment does not prevent sale, 1799.
not suspended when mortgagor within the lines of enemy, 1800.

When the exercise of the power may be enjoined, 1801–1820.

a legitimate exercise of the power cannot be enjoined, 1801.
exercise of power at request of mortgagor, 1802.
use of the power to obtain an unfair advantage, 1803.
grounds of interference must be alleged, 1804.
petitioner's rights must be clear, 1805.
payment must be tendered, 1806.
when mortgage was void in its inception, 1807.
on account of usury, 1808.
of unconscionable penalty or interest, 1809.
want of notice of sale no ground for enjoining, 1810.
not to allow set-off, 1811.
not to allow time for contribution to redeem, 1812.
when amount of debt is in dispute, 1813.
purchaser subject to mortgage ignorant of power in it, 1814.
clouding title, 1815.
insolvency of trustee no ground, 1816.
scarcity of money or business depression no ground, 1817.
appointment of referee to act with mortgagee, 1818.
recovery of money paid under duress, 1819.
mortgagee's damages and costs when wrongly enjoined, 1820.

Personal notice of sale, 1821–1827.

no notice necessary unless made so by statute or deed, 1821.
all essential requisites of power must be complied with, 1822.
when mortgagor is under disability, 1823.
mortgagor cannot waive notice for others, 1824.
promise of mortgagee not to sell without notice, 1825.
ground for setting aside sale, 1826.
burden of proof as to notice, 1827.

Publication of notice, 1828–1838.

for a certain time in newspaper usually required, 1828.
statutes do not apply beyond the states enacting them, 1829.
fairness in giving notice required, 1830.
notice published before default ineffectual, 1831.
assignment of mortgage during time of advertisement, 1832.
change of statute as to length of notice, 1833.
how long after publication sale may be, 1834.
selection of newspaper, 1835.

POWER OF SALE IN MORTGAGES, ETC. — *continued.*
publication in two counties, 1836.
posting in public places, 1837.
length of time of publication, 1838.
once a week for three successive weeks, 1838.
What the notice should contain, 1839–1856.
should fully comply with the terms of power, 1839.
must describe the premises, 1840.
description by reference to plan, 1840.
distinct lots should be described separately, 1841.
short and incomplete description, 1842.
must show who orders the sale, 1843.
need not name owners of equity of redemption, 1844.
must specify time and place of sale, 1845.
discretion as to the time, place, and terms of sale, 1846.
day of sale fixed for Sunday, 1847.
sale at ruins of court-house in Chicago, 1848.
sale at temporary court-house, 1849.
sale at city hall, 1850.
mistake in advertisement, 1851.
misleading notices, 1852.
change in time appointed for sale, 1852.
sale of equity of redemption, 1853.
unimportant omissions, 1854.
statement of the amount claimed, 1855.
amount of prior mortgage need not be stated, 1856.
Sale in parcels, 1857–1860.
no obligation except under statutes and special equities, 1857.
when sale of property entire not justified, 1858.
when trustee should sell in parcels, 1859.
sale of sufficient only to pay the debt, 1860.
Conduct of sale, terms and adjournment, 1861–1875.
mortgagee may act by attorney, 1861.
need not be personally present, 1861.
trustee under deed of trust should be present, 1862.
when sale may be had, 1863.
terms of sale, 1864.
acquiescence of mortgagor in conduct of sale, 1865.
payment at time of sale, 1866.
time for examination of title, 1867.
giving credit, 1868.
when terms of sale not prescribed by power, 1869.

POWER OF SALE IN MORTGAGES, ETC. — *continued.*
when mortgagee may use his discretion, 1870.
mortgagee may give credit, taking the risk himself, 1871.
when mortgagee authorized to sell for cash or credit, 1872.
adjournment, 1873.
notice of adjournment, 1874.
no obligation to delay sale to more favorable time, 1875.
Who may purchase at sale, 1876–1888.
mortgagee not allowed to purchase, 1876.
not necessary to show fraud in mortgagee's purchase, 1877.
rule applies to mortgagee's solicitor, 1878.
mortgagee's agent, 1879.
trustee in deed of trust cannot buy, 1880.
less strictness in case of mortgagee, 1881.
no restraint when sale is by judicial process, 1882.
express provision that mortgagee may purchase, 1883.
rule has no application to subsequent mortgagee, 1884.
right to avoid sale waived by delay, 1885.
right lost after transfer to *bonâ fide* purchaser, 1886.
mortgagor may purchase, 1887.
mortgagor's wife may purchase, 1888.
Deed and title, 1889–1903.
holder of legal title should make deed, 1889.
married woman may make deed, 1890.
deed in name of mortgagor or mortgagee, 1891.
mortgagee purchasing may deed to himself, 1892.
no deed required in New York, 1893.
title passes by delivery of deed, 1894.
deed not evidence of recitals in it, 1895.
deed to person other than purchaser, 1896.
purchaser takes divested of subsequent incumbrances, 1897.
bonâ fide purchaser acquires valid title, 1898.
though mortgage has been paid, 1898.
title not affected by prior agreements of parties, 1899.
in England not bound to inquire as to regularity of sale, 1900.
mortgagor's covenant for further conveyance, 1901.
invalid sale operates as assignment, 1902.
remedy against purchaser declining to complete sale, 1903.
The affidavit, 1904, 1905.
neglect to file does not invalidate sale, 1904.
what is requisite to make it presumptive evidence, 1905.
Setting aside and waiving sale, 1906–1922.

POWER OF SALE IN MORTGAGES, ETC. — *continued.*
fairness in the exercise of the power required, 1906.
whether sale void or voidable, 1907.
without leave of bankrupt court, 1908.
allowing property to be sacrificed, 1909.
avoided by secret arrangement to prevent competition, 1910.
fraud or deception practised upon owner, 1911.
conduct of purchaser at sale, 1912.
purchaser knowing of circumstances invalidating, 1913.
purchase by agent without authority, 1914.
mere inadequacy of price not alone ground for, 1915.
waived by extinguishing time of redemption, 1916.
promise to allow mortgagor to repurchase, 1917.
suit for second instalment does not open, 1918.
subsequent entry to foreclose does not open, 1919.
waived by agreement, 1920.
relief must be sought in equity, 1921.
delay in seeking relief, 1922.
Costs and expenses, 1923–1926.
mortgagee not generally entitled to compensation, 1923.
reasonable expenses incurred in advertising, 1924.
expenses for legal advice, 1925.
costs under sale by order of court in bankruptcy, 1926.
The surplus, 1927–1939.
generally mortgage provides for disposal of, 1927.
not chargeable with interest when unproductive, 1928.
must be applied according to title, 1929.
notice of claims to, 1930.
whether heir or administrator entitled to, 1931.
in case of bankruptcy, 1932.
dower in surplus, 1933.
when equity attached or sold on execution, 1934.
judgment lien upon, 1935.
when mortgagor has conveyed part, 1935.
when sale was for an instalment, 1936.
payment of whole debt on sale for instalment, 1937.
when only part of debt has matured, 1938.
rights determined in suit for money had and received, 1939.
Judgment for deficiency after sale, 1227.
POWER TO MORTGAGE, a power to sell does not include, 129.
includes power to make mortgage in usual terms, 129.
mode of exercising, 130.

Reference is to Sections.

PRACTICE. (See PLEADING AND PRACTICE.)
PREËMPTOR of public land cannot mortgage, 177.
PREFERENCE, mortgage given in contrary to law, 629.
PRESUMPTION OF PAYMENT. (See PAYMENT, 913–918.)
PRIOR INCUMBRANCERS cannot properly be made parties to foreclosure suit, 1439, 1445, 1474, 1589.
PRIORITY by registration, 456, 569.
once gained cannot be lost, 558.
though record be destroyed, 559.
as affected by notice, 570–609.
doctrine in this country, 572, 573.
as affected by fraudulent concealment of incumbrance, 602.
by fraud inducing one to purchase as unincumbered, 603.
as affected by negligence, 604–606.
as between holders of several notes secured, 606, 1699, 1939.
as between individual and partnership mortgages, 606.
as between simultaneous mortgages, 606.
as between unrecorded mortgages, 607.
agreements fixing priority, 608.
over mechanic's lien, 909.
of assignee of one note, 822.
between mortgages may be settled in foreclosure suit, 1441.
questions of, when to be settled, 1610.
between holders of several notes, 1699–1707, 1939.
note first maturing entitled to, 1699.
whether priority of assignment gives, 1701.
may be fixed by agreement, 1702.
when whole debt becomes due upon any default, 1703.
when mortgage secures debts due to different persons, 1705.
rights of sureties, 1706.
PROMISSORY NOTE, not subject to equities in hands of assignee, 837.
otherwise when over due, 841.
PROOF of note in foreclosure suit, 1470.
PURCHASE MONEY MORTGAGE has priority over judgments, 464–466.
has priority of homestead rights, 466.
simultaneous mortgages for, 567, 568.
defence of outstanding title, 1500.
defence is founded on the covenants, 1501.
eviction necessary before defence will avail, 1502.
exceptional cases, 1503.

PURCHASE MONEY MORTGAGE — *continued.*
breach of covenant of seisin in, 1504.
breach of independent covenant in, 1505.
when sale was effected by vendor's fraud, 1506.
assignee before due not subject to this default, 1507.
application of proceeds to prior incumbrance, 1698.
PURCHASER, a mortgagee is, within recording acts, 458, 710.
a judgment creditor is not, 460.
may rely upon title as it appears of record, 549.
of timber from mortgagor wrongfully cut, 689.
mortgagee may be, of equity of redemption, 711, 712.
Of the equity of redemption, his rights and liabilities, 735–770.
importance of reference to mortgage, 735.
by deed without covenants, 736.
expressly subject to mortgage, 736.
not entitled to collateral security, 737.
when not personally liable for debt, 738.
of paramount title, 739.
assumption of mortgage by, 740.
mortgagor becomes surety to, 741.
extension when discharges mortgagor, 742.
assumption of proportionate part by, 743.
cannot defend against mortgage assumed, 744.
cannot set up usury, 745.
when purchaser may contest mortgage, 746.
purchase under execution, 747.
Personal liability of purchaser, 748–770.
none under deed merely subject to mortgage, 748.
under agreement to pay the mortgage, 749.
under verbal promise to assume, 750.
when bound to indemnify mortgagor, 751.
bound by accepting deed, 752.
married woman assuming, 753.
what will avoid liability, 754.
how mortgagee may take advantage of agreement to assume, 755.
junior mortgagee assuming not liable, 756.
assumption in absolute deed which is in fact a mortgage, 757.
promise for benefit of mortgagee, 758.
mortgagee may sue on promise without foreclosure, 759.
though grantor himself not liable for the debt, 760.

PURCHASER — *continued.*
promise must be express, 761.
doctrine of New York courts not adopted elsewhere, 762.
whether grantor can release purchaser, 763.
when he may release purchaser, 764.
condition that grantee pay mortgage, 765.
when purchaser entitled to a release, 767.
remedy of grantor against, 768.
contract to pay a mortgage may be enforced before promisee has paid it, 769.
measure of damages in action by grantor against, 770.
may redeem, 1061.
assuming mortgage cannot set up statute of limitations, 1201.
has no greater rights against mortgagee than mortgagor had, 1202.
pendente lite need not be made party to foreclosure suit, 1411.
subject to mortgage cannot defend against it, 1491.
rights of under foreclosure sale, 1642–1681.

RAILROAD COMPANY, limitation of power to mortgage, 124, 125.
when mortgage covers after-acquired property of, 152, 154.
after-acquired property not essential to its business, 156.
after-acquired property passes without special mention, 157.
mortgage of future earnings of, 159.
mortgage does not cover corporate existence, 161.
rolling stock of, whether covered by mortgage, 452.
RATIFICATION of mortgage irregularly executed, 93.
by infant mortgagor on coming of age, 105.
RECEIVER, may discharge mortgage, 965.
When a receiver will be appointed, 1516–1534.
general principles, 1516.
when appointed on application of mortgagor, 1517.
appropriate under leasehold mortgages, 1518.
English rule as to appointment of, 1519.
rule in the United States, 1520.
rule in New York and other states, 1521.
statutory provisions in several states, 1522.
when subsequent mortgagee may obtain appointment, 1523.
consent of prior mortgagee, 1524.
prior mortgagee's right of possession, 1525.
when application may be made, 1526.
defences to application, 1527.
application must show defendant in possession, 1528.

RECEIVER, *continued.*
must show amount of mortgage debt, 1529.
mortgage must be due, 1530.
bill must be pending, 1531.
security must be inadequate and mortgagor insolvent, 1532.
additional grounds, 1533.
criterion of adequacy, 1534.
Duties and power of receiver, 1535–1537.
represents all parties in interest, 1535.
his possession is that of the court, 1535.
his claim to rents, 1536.
payment discharges, 1537.
RECITAL in other instruments notice by, 594.
in deed, notice by, 595.
in mortgage, of mortgagor's indebtedness, effect of, 677, 678.
RECORD. (See Registration.)
of separate defeasance, 253.
notice furnished by the record, 25.
not to be relied upon as showing merger, 872.
when averment of necessary, 1465.
REDELIVERY of mortgage for a new obligation, 362.
REDEMPTION, provisions restraining, 6.
mortgagor cannot renounce beforehand, 251.
of mortgage in form of absolute deed, 342.
A necessary incident of a mortgage, 1038–1046.
express stipulation not to redeem, 1039.
time of may be postponed, 1040.
agreement to confine to a particular person, 1041.
any agreement which is an evasion of, 1042.
agreement not to redeem after a certain day, 1043.
mortgagee not allowed to obtain an advantage, 1044.
subsequent agreement against, 1045.
after release improperly obtained, 1046.
Circumstances affecting, 1047–1051.
after imperfect foreclosure, 1048, 1680.
mortgagor estopped by his own acts, 1049.
of one only of several mortgages, 1050.
after foreclosure sale, 1051.
given by statute is a rule of property, 1051.
When it may be made, 1052–1054.
not till mortgage is due, 1052.
when time has been extended, 1053.

Reference is to Sections.

REDEMPTION — *continued.*
when advantage must be taken of irregular foreclosure, 1054.
Who may redeem, 1055–1069.
any party in interest, 1055.
a mortgagor who has conveyed the equity, 1056.
a mortgagor after foreclosure by junior mortgagee, 1057.
under a mortgage for support, 1058.
holder of mere equitable title, 1059.
grantor by an absolute deed, 1060.
purchaser of equity of redemption, 1061.
heir at law or devisee, 1062.
part-owner of equity of redemption, 1063.
subsequent mortgagee, 1064.
as between several persons entitled to redeem, 1064.
tenant for life, or in tail, 1065.
tenant for years 1066.
dowress who has released in the deed, 1067.
tenant by the curtesy, 1067.
holder of homestead estate, 1067.
a surety of the debt, 1068.
a judgment creditor, 1069.
an attaching creditor, 1069.
Sum payable to effect it, 1070–1088.
payment of the amount due, a condition, 1070.
notice of payment, 1071.
must be of entire debt, 1072.
after bankruptcy, 1073.
when part of premises has been foreclosed, 1074.
after a foreclosure sale, 1075.
special exceptions, 1076.
when part only of debt is due, 1077.
when whole debt becomes due on any default, 1078.
further advances, 1079.
prior incumbrance paid by mortgagee, 1080.
payment of other claims cannot be made a condition, 1081.
English doctrine of tacking, 1082.
consolidating mortgages, 1083.
costs of previous foreclosure, 1084.
overpayment to prevent foreclosure, 1085.
mortgagee cannot be compelled to assign, 1086.
otherwise in New York, 1087.
tender after breach of condition, 1088.

REDEMPTION — *continued.*

Contribution to redeem, 1089–1092.

test of the right to claim, 1089.

the general rule as to, 1090.

when the mortgagor retains part of the premises, 1091.

portions sold chargeable in inverse order, 1092.

Pleadings and practice on bills for, 1093–1113.

bill should conform to general principles of pleading, 1094.

bill must tender amount due, 1095.

after payment in full, 1096.

the parties, 1097.

proper parties plaintiff, 1098.

heir of mortgagor, 1099.

trustees who hold equity of redemption, 1099.

the parties defendant, 1100.

after death of mortgagee, 1101.

when junior mortgagee seeks to redeem, 1102.

holder of note without mortgage, 1103.

reference to state account, 1104.

defences, 1105.

the decree, 1106.

decree should fix time for redemption, 1107.

failure to pay decree works foreclosure, 1108, 1566.

abandonment of suit, 1109.

effect of redemption, 1110.

general rule as to costs, 1111.

costs of suit brought without previous tender, 1112.

costs after refusal of tender, 1113.

When right of is barred, 1144–1173.

statute of limitations applies by analogy, 1144.

time conforms to statute in force, 1145.

redemption and foreclosure reciprocal, 1146.

right barred in ten years in New York and Wisconsin, 1147.

in Tennessee statute does not apply, 1148.

When the statute begins to run against, 1152–1161.

not while relation of mortgagor and mortgagee exists, 1152.

under a Welsh mortgage, 1153.

possession runs against remainder-men, 1154.

when mortgagee retains possession of part, 1155.

cause of action accrues when mortgagee enters, 1156.

twenty years' possession presumed to be a bar, 1157.

mere constructive possession not sufficient, 1158.

REDEMPTION — *continued.*
when notice to mortgagor necessary, 1159.
when right to redeem junior mortgage accrues, 1160.
statute runs from expiration of year of redemption after imperfect foreclosure, 1161.
What prevents the running of the statute against, 1162–1173.
acknowledgment of right, 1162.
acknowledgment after twenty years, 1163.
acknowledgment to third person, 1164.
acknowledgment binding upon all under mortgagee, 1165.
rendering an account, 1166.
acknowledgment by letter, 1167.
assignment of mortgage, 1168.
recital of mortgage in deed, 1169.
proceedings to enforce lien or debt, 1170.
verbal acknowledgment, 1171.
filing of bill to redeem stops running of statute, 1172.
how statute may be pleaded, 1173.
Time allowed for, after decree of strict foreclosure, 1565.
none allowed after decree of sale, 1586.
REFERENCE, to state account upon redemption, 1104.
to state amount of debt, 1467.
as to title of premises sold under decree, 1648.
as to rights of claimants to surplus, 1685, 1686.
REFORMATION of a mortgage, 65, 66, 67, 97.
who may obtain, 98.
against whom it may be had, 99.
of description in foreclosure suit, 1464.
REGISTRATION, nature and application of laws for, 456.
in England, 456, 457.
mortgagee a purchaser within acts for, 458.
judgment creditor not a purchaser, 460.
priority as between mortgage and judgment, 461.
unrecorded mortgage preferred to judgment, 462.
reverse rule in some states, 463.
purchase money mortgage, 464.
priority of, 465, 466.
not necessary against mortgagor and heirs, 467.
or assignee of bankrupt, 468.
equitable mortgages within the acts, 469, 470.
mortgages of leasehold estates, 471.
acts apply to assignments, 472.

REGISTRATION — *continued.*
statutory provisions as to, 473.
consequence of omitting, 474.
assignee a purchaser, 475.
priority between assignees, 476.
manner of recording, 477.
acts apply to agreements affecting mortgages, 478.
acts apply to mortgages of crops, 479.
acts of the several states, 480–526.
Requisites as to execution of mortgage, 527–549.
description of property, 528.
apparent error in description, 529.
signing, 530.
sealing, 531.
witnessing, 532.
acknowledgment or proof, 533.
qualification of officer, 534.
ministerial act, 535.
certificate of official character, 536.
personal acquaintance, 537.
certificate not conclusive, 538.
delivery necessary, 539, 540.
subsequent delivery, 541.
requisites as to time and manner of, 542–549.
notice from time of filing deed, 542.
certificate of register conclusive of time, 543.
requirement of, within a specified time, 544.
after death of mortgagor, 545.
in books kept for mortgages, 546.
requirement of as to power of attorney, 547.
of separate defeasance, 548.
purchaser may rely upon title that appears of record, 549.
errors of, 550–556.
defective not notice, 550.
errors in, do not affect third persons, 551.
exception under statutes, 552.
index no part of, 553.
damages for errors in index, 554.
errors in descriptive index, 555.
mortgage defectively recorded an equitable lien, 556.
effect of duly made, 557.
priority once gained cannot be lost, 558.

REGISTRATION — *continued.*
though record be destroyed, 559.
after-acquired title, 561.
deeds recorded subsequent to the mortgage are not notice to the mortgagee, 562.
is notice of the amount specified in mortgage, 563.
of extension of mortgage, 564.
is notice of lien at rate of interest specified, 565.
acts do not apply to simultaneous mortgages, 566.
of simultaneous mortgages for purchase money, 567, 568.
notice as affecting priority by, 570–609.
policy of admitting notice to affect, 571.
doctrine of notice as affecting, 572, 573.
when title of prior mortgagee affected by record, 575.
examination of records, 576.
whether required before exercise of power of sale, 1784.
RELEASE, provision for partial, 79.
REMAINDER-MEN need not be made parties to foreclosure suit, 1401.
REMEDIES against purchaser who has assumed a mortgage, 768.
for removal of fixtures, 453–455.
for enforcing a mortgage, 1215–1236.
are concurrent, 72, 1215.
creditor's bill may be maintained at same time, 1217.
personal remedy before foreclosure, 1220.
power of sale need not be first exercised, 1221.
suit to foreclose and suit for debt at same time, 1222, 1224.
rule changed by statute in some states, 1223.
upon express covenant in mortgage, 1225.
personal liability does not exist, when, 1226.
personal remedy after foreclosure, 1227.
suit at law for deficiency after sale, 1228.
sale of mortgaged premises on execution for same debt, 1229.
execution for same debt may be levied on other property, 1230.
as affected by bankruptcy, 1231–1236.
discharge does not prevent foreclosure, 1231.
in what court lien may be enforced, 1232–1234.
RENEWAL of note does not affect the mortgage, 355.
a sufficient consideration for a mortgage, 612.
should be alleged in bill to foreclose, 1468.
RENTS AND PROFITS, mortgagor's right to, 670, 771, 1120.
after entry of mortgagee, 671.

RENTS AND PROFITS — *continued.*
mortgagee before entry has no lien upon, 772.
accruing at time of foreclosure sale, 1659.
mortgagee in possession must account for, 1114–1120.
what chargeable with, 1121–1125.
REPAIRS by mortgagee in possession, allowances for, 1126–1131.
REPLEVIN may be maintained by mortgagee for fixtures removed, 453.
for timber removed, 688.
RESALE under decree of foreclosure, 1639, 1669.
REVIVOR of mortgage, 943–949.
cannot be had to prejudice of third persons, 944.
assignment to third person at request of mortgagor, 945.
redelivery of mortgage note, 946.
verbal agreement to continue for another debt, 947.
as against other parties having interests in the property, 948.
as against wife when she is surety, 949.
RHODE ISLAND, nature of a mortgage in, 49.
vendor's lien not adopted in, 191.
parol evidence to show a mortgage, 313.
provisions respecting registration in, 516.
provisions respecting mechanics' liens, 516.
usury in, 633.
entry of satisfaction of record, 1027.
redemption after entry to foreclose, 1051, 1356.
statute of limitations, twenty years, 1193.
provisions respecting foreclosure by entry and possession, 1245.
ejectment to foreclose mortgage, 1279.
statutory provisions relating to foreclosure, 1356.
power of sale mortgages and trust deeds in, 1756.
RIGHT OF ACTION, when it accrues, 1174–1191.
bill to foreclose must show it has accrued, 1471.
ROLLING STOCK of railroads, whether fixtures, 452.

SALE of mortgage at discount not usury, 641.
enforcement of against purchaser. (See FORECLOSURE SALE.)
Sale, setting aside of. (See FORECLOSURE SALE, 1668–1681.)
Sale in parcels, under decree of court, 1616–1619.
required in Indiana; 1334, *n.*
may be required by statute or by court, 1616.
when wishes of mortgagor to be followed, 1617.
when property may be sold entire, 1618.
sale on subsequent default, 1619.

SALE — *continued.*
Under power of sale mortgages and trust deeds, 1857–1860.
generally no obligation, 1857.
under statutes and in case of special equity, 1857.
when sale of property entire not justified, 1858.
when trustee should sell in parcels, 1859.
sale of sufficient only to pay debt, 1860.
SCIRE FACIAS, foreclosure by in Colorado, 1325.
in Illinois, 1333.
in Pennsylvania, 1355.
SEAL, requisite to a mortgage, 81.
by corporation necessary, 128.
provisions of the several states regarding, 531.
implies consideration, 613.
SET-OFF, when may be availed of in foreclosure suit, 1496–1498.
SETTING ASIDE OF SALE. (See FORECLOSURE SALE.)
SIGNING, a requisite, 81, 530.
SIMULTANEOUS MORTGAGES, recording acts do not apply, 566.
for purchase money, 567, 568.
several notes secured by one mortgage, 606.
surplus under, 1689.
SOLICITOR'S FEES. (See ATTORNEY.)
SOUTH CAROLINA, nature of a mortgage in, 50.
vendor's lien denied in, 191.
parol evidence to show a mortgage, 314.
provisions respecting registration in, 517.
provisions respecting mechanics' liens, 517.
usury in, 633.
assignment of debt passes mortgage in, 817.
entry of satisfaction of record, 1028.
no redemption after foreclosure, 1051, 1357.
statute of limitations, twenty years, 1193.
statutory provisions relating to foreclosure, 1357.
power of sale mortgages and trust deeds in, 1757.
STATUTE OF LIMITATIONS. (See LIMITATIONS, STATUTE OF.)
STATUTORY MORTGAGE, what is, 178.
STAY of foreclosure proceedings, when improperly used, 1447.
of proceedings on account of controversy between subsequent incumbrancers not allowed, 1601.
STREET, mortgagor cannot dedicate to public use as against mortgagee, 676.
STRICT FORECLOSURE. (See FORECLOSURE WITHOUT SALE.)

Reference is to Sections.

SUBROGATION arises by operation of law, when, 874.
applies generally in favor of one paying a debt for another, 874.
test of the right, 876.
mortgage paid by one not under obligation to pay it, 877.
mortgagee paying prior incumbrance, 878, 1080, 1137.
mortgagor purchasing his own mortgage, 879.
when mortgage is enforced upon other property, 880.
indorser or surety paying the debt, 881.
whether surety subrogated to debt as well as security, 882.
of surety to securities given subsequently, 883.
when creditor has made further advances, 884.
not lost by renewal of mortgage, 885.
SUNDAY, validity of mortgage executed on, 623.
SUPPORT, mortgage for, whether strictly a mortgage, 388.
when mortgagor's right of possession implied, 389.
alternative condition for, 390.
where to be furnished, 391.
who may perform condition for, 392.
who may foreclose mortgage for, 393.
agreement for arbitration in mortgage for, 394.
mortgage for may be redeemed, 395.
performance of condition for, 887.
when it implies the mortgagor may remain in possession, 668.
SURETY, wife mortgaging her property for her husband's debt, 114.
when principal creditor is entitled to security given to, 385.
whether he may release security, 386.
cannot release after liability is fixed, 387.
mortgagee should not release security to prejudice of, 724.
principal creditor entitled to security to, 726.
when mortgagor becomes, as to purchaser, 741.
paying debt, subrogated to security, 881.
whether subrogated to debt, 882.
subrogated to securities given after original contract, 883.
may redeem mortgage, 1063.
when may foreclose mortgage in his own name, 1380.
right of in surplus proceeds, 1706.
SURPLUS, from foreclosure sale under decree, 1684–1698.
usually paid into court, 1684.
court may appoint referee to settle claims to, 1685.
exceptions may be taken on filing of report, 1686.
only absolute liens considered, 1687.
when there are several liens on the premises, 1688.

SURPLUS — *continued.*
simultaneous mortgages, 1689.
mortgagee may make claim to, 1690.
equities of subsequent incumbrancers of part, 1691.
prior unrecorded mortgage preferred to judgment, 1692.
dower in surplus, 1693, 1694.
of sale made after death of mortgagor, 1695.
lessee for years not entitled to, 1696.
attachment of, 1697.
upon sale under junior mortgage, 1698.
holder of notes not due not entitled, 1700.
From sale under power, 1927–1939.
deed generally provides for disposal of, 1927.
unproductive, not chargeable with interest, 1928.
must be applied according to title, 1929.
notice of claims to, 1930.
whether administrator or heir entitled to, 1931.
in case of bankruptcy, 1932.
dower in, 1933.
when equity of redemption has been attached or sold under execution, 1934.
judgment lien, 1935.
when mortgagor has conveyed part, 1935.
from sale for instalment, 1936, 1937, 1938.
right to, may be determined by suit for money had and received, 1939.

TACKING other debts to mortgage, 360.
English doctrine of, 569, 1082.
TAXES, provision for payment of, 77.
are generally secured by mortgage, 358.
on mortgage debt, agreement to pay, 636.
tax title acquired by mortgagor, 680.
by mortgagee, 713.
when a trust, 714.
mortgagee paying is subrogated to lien of, 1080.
paid by mortgagee allowed in account, 1134.
failure to pay, when a breach of the condition, 1175.
Payment of by mortgagor does not make his possession hostile, 1200.
decree of sale should include, 1597.
when an incumbrance which will excuse purchaser from completing sale, 1649.

TENANT FOR LIFE may make a mortgage, 137.
TENANT IN COMMON, of partnership real estate mortgaged, 119–123.
joint mortgagee after foreclosure is, 135.
mortgage to two to secure debt to one, 170, 704.
mortgage by, 141, 1314.
partition in case of mortgage of one of several parcels held in common, 706.
may redeem, 1063.
parties defendant in foreclosure suit, 1409.
TENDER before and after default, 886–903.
before or at the day revests the estate, 891.
but the debt still subsists, 891.
though a gift is lost with the estate, 891, 893.
after breach does not amount to a discharge, 892.
rule otherwise in New York and Michigan, 893.
though not kept good, debt discharged, 893.
questions as to sufficiency of, 894.
of whole debt necessary, 894.
who may make, 895.
must be made to a person authorized to receive, 896.
when it may be made to mortgagee after he has assigned the mortgage, 896.
place of tender, 897.
when mortgagee avoids it, 897.
may be made at any time of day, 898.
interest runs from the time of, 899.
must be absolute and unconditional, 900.
in what money it may be made, 901.
in legal tender notes of the United States, 901.
must cover costs, 901.
costs incurred by refusal of, 902, 1113.
for purpose of redemption, 1088.
what is sufficient, 1088.
should be made in bill to redeem, 1095.
not accepted does not prevent foreclosure, 1450.
after breach does not defeat power of sale, 1793.
otherwise held where, 1794.
TENNESSEE, nature of a mortgage in, 51.
form of mortgage, 61.
written authority to fill blanks, 90.
vendor's lien adopted in, 191.
not assignable, 212.

TENNESSEE — *continued.*
parol evidence to show a mortgage, 315.
provisions respecting registration in, 518.
provisions respecting mechanics' liens, 518.
usury in, 633.
entry of satisfaction of record, 1029.
redemption after foreclosure, 1051, 1358.
statute of limitations does not apply to redemption in, 1148.
statute of limitations, seven years, 1193.
statutory provisions relating to foreclosure, 1358.
strict foreclosure in, 1554.
power of sale mortgages and trust deeds in, 1758.
TERMS OF SALE under decree of foreclosure, 1613–1615.
TEXAS, nature of a mortgage in, 52.
vendor's lien adopted in, 191.
assignable, 212.
parol evidence to show a mortgage, 316.
provisions respecting registration in, 519.
provisions respecting mechanics' liens in, 519.
usury in, 633.
assignment of debt passes mortgage in, 817.
entry of satisfaction of record, 1030.
no redemption after foreclosure, 1051, 1359.
statute of limitations, ten years, 1193.
mortgage barred when debt barred, 1207.
statutory provisions relating to foreclosure, 1359.
power of sale mortgages and trust deeds in, 1759.
TITLE BOND, legal effect of, 226.
may be foreclosed as a mortgage, 1449.
a strict foreclosure proper, 1541.
TITLE DEED, mortgage by deposit of, 179.
doctrine in England, 180.
legal effect of the deposit, 181.
omission of part of the deeds, 182.
presumption of purpose of deposit, 183.
law of place of contract governs deposit, 184.
American doctrine, 185, 186.
memorandum of deposit, 187.
how such mortgage is enforced, 188.
possession of essential in absence of recording acts, 457.
for security of grantor's general creditors properly foreclosed in equity, 1448.

TREES in nursery, whether part of realty, 434.
TRESPASS, mortgagor cannot maintain against mortgagee, 674.
mortgagee may maintain for mesne profits, 721.
against mortgagor for waste, 687, 696.
TRUST, distinguished from mortgage, 281, 332.
notice of a secret, 577.
parol, does not attach to mortgage, 846.
TRUST DEED. (See Deed of Trust.)
TRUSTEE PROCESS, mortgagor may be held to answer to, 938.
TRUSTEES, one of several cannot assign, 795.
mortgages by, 102.
cannot discharge, 959.
foreclosure suit by nominal, 1383, 1384.
for creditors may maintain foreclosure suit, 1386.
when proper party to foreclosure suit, 1399.

USE AND OCCUPATION, whether mortgagor liable for, 671.
USURY, as affecting mortgages, 633–663.
intent to take, 634.
whether payment of attorney's fees constitutes, 635.
whether payment of taxes on debt constitutes, 636.
whether payment of exchange constitutes, 637.
whether payment of fines, &c., constitutes, 638.
whether agreement for repurchase is, 639, 640.
whether sale of mortgage constitutes, 641.
taken by agent, 642.
burden of proof, 643.
who may set up defence of, 644.
mortgagor estopped by certificate of validity, 645, 1495.
cannot be set up after foreclosure, 646.
bonus paid to secure extension, 647, 648.
when it avoids agreement for extension, 649.
Compound interest, whether it constitutes, 650.
while agreement for is executory, 651.
accrued interest a debt, 652.
interest coupons, 653.
computation of interest, 654.
Conflict of laws as to, 656–663.
what law governs, 657
laws of another state not implied, 658.
when law of place of contract prevails, 659.
lex rei sitæ does not control, 660.

USURY — *continued.*
effect of, 661.
governs form and validity, 662.
laws of another state must be pleaded, 663.
cannot be set up by purchaser who has assumed mortgage, 745.
in assignment of mortgage, 832.
defence to foreclosure, 1300, 1493, 1499.
purchaser subject to mortgage cannot set up, 1494.
previously paid may be offset, 1499.
as ground for enjoining sale under power, 1808, 1809.
UTAH TERRITORY, nature of a mortgage in, 53.
provisions respecting registration in, 520.
provisions respecting mechanics' liens in, 520.
usury in, 633.
entry of satisfaction of record, 1031.
statutory provisions relating to foreclosure, 1360.

VADIUM, *mortuum* and *vivum*, 2, 4.
VENDEE'S LIEN for money paid before receiving conveyance, 223.
upon rescission of contract of sale, 224.
VENDOR'S IMPLIED LIEN, 189–222.
nature of, 189.
ground of the doctrine, 190.
in what states adopted, 191.
presumed to exist, 192.
extent of, 193.
for unliquidated claim, 194.
as affected by agreement of parties, 195.
parol evidence that no lien was intended, 196.
waiver of, 197, 198.
defeated by vendee's conveyance, 199.
or mortgage, 200.
when judgment lien takes precedence, 201.
against vendee's assignee in bankruptcy, 202.
subject to legal lien arising at same time, 203.
purchaser with notice of, 204, 205.
without notice of, 206.
waived by taking distinct security, 207.
though this be inadequate, 208.
whether taken at same time or not, 209.
not conclusively, 210.
when vendor estopped to claim lien, 211.

Reference is to Sections.

VENDOR'S IMPLIED LIEN — *continued.*
whether assignable with the debt, 212.
subrogation to, 213.
when notes are made to third person, 214.
indorsement of note without recourse, 215.
as collateral security, 216.
mere change in form of debt, 217.
lost when debt is barred, 218.
whether remedy at law must be first exhausted, 219.
parties to bill to enforce, 220.
decree to enforce, 221.
marshalling assets, 222.
VENDOR'S LIEN BY CONTRACT, nature of, 225.
legal effect of title bond, 226.
vendor cannot affect, 227.
express reservation in deed, 228, 229.
vendor's title imperfect, 230.
married woman bound by, 231.
waiver of, 232.
assignment of, 235.
order of payment of notes, 236.
enforced, though note is barred, 237.
proceedings to enforce, 239.
tender of performance before action, 240.
VENUE of suits to foreclosure mortgages, 1444.
VERMONT, nature of a mortgage in, 54,
vendor's lien denied in, 191.
parol evidence to show a mortgage, 317.
rule as to fixtures in, 442.
statutory provisions as to fixtures, 443.
provisions respecting registration in, 521.
provisions respecting mechanics' liens in, 521.
usury in, 633.
entry of satisfaction of record, 1033.
redemption after foreclosure, 1051, 1361.
statute of limitations, fifteen years, 1193.
statutory provisions to foreclosure, 1361.
strict foreclosure is the form in use, 1555.
power of sale mortgages and trust deeds in, 1760.
VIRGINIA, nature of a mortgage in, 55.
written authority to fill blanks, 90.
vendor's lien denied in, 191.

VIRGINIA — *continued.*
parol evidence to show a mortgage, 318.
provisions respecting registration in, 522.
provisions respecting mechanics' liens in, 522.
usury in, 633.
entry of satisfaction of record, 1032.
no redemption after foreclosure, 1051, 1362.
statute of limitations, fifteen years, 1193.
statutory provisions relating to foreclosure, 1362.
power of sale mortgages and trust deeds in, 1761.
VIVUM VADIUM, 2.
VOID AND VOIDABLE MORTGAGES, 610–632.
for want of consideration, 610, 612.
not necessary that consideration pass at the time, 611.
mortgage by way of gift, 614.
mortgage for accommodation, 615.
for illegality of consideration, 617.
as contrary to public policy, 618.
who may take advantage of illegality, 619.
gaming contracts, 619.
when illegal consideration can be separated, 620.
mortgage may be valid in part, 621.
burden of proof, 622.
executed on Sunday, 623.
debt contracted on Sunday, 623.
for fraud on part of mortgagee, 624.
fraudulent intent, 625.
mortgage obtained by duress is, 626.
mortgage made to defraud creditors, 627.
fraud as to a particular creditor, 628.
for fraudulent preference, 629.
who may take advantage of, 630.
when mortgagor estopped to claim invalidity, 631.
or that the mortgage was made to defraud creditor, 632.

WAIVER, of vendor's lien, 207–210.
of lien by contract, 232.
of entry and foreclosure, 1265–1275.
made conditionally, 1272.
of strict foreclosure, 1569, 1570.
of power of sale, 1792–1800.
of sale made under power, 1906–1922.

WASHINGTON TERRITORY, nature of a mortgage in, 55 *a*.
provisions respecting registration in, 523.
provisions respecting mechanics' liens in, 523.
usury in, 633.
entry of satisfaction of record, 1034.
statutory provisions relating to foreclosure, 1363.
WASTE by stranger, mortgagor may recover for, 664.
By mortgagor, 684–698.
may be restrained by injunction, 684.
removal of timber already cut, 685.
no obligation on part of mortgagee to enjoin, 686.
mortgagee may maintain trespass for, 687.
mortgagee may maintain replevin for, 688.
liability of purchaser of timber, 689.
WELSH MORTGAGE, 3.
mortgagee's possession does not bar redemption, 1153.
WEST VIRGINIA, nature of a mortgage in, 56.
vendor's lien denied in, 191.
parol evidence to show a mortgage, 319.
provisions respecting registration in, 524.
provisions respecting mechanics' liens in, 524.
usury in, 633.
entry of satisfaction of record, 1035.
no redemption after foreclosure, 1051, 1364.
statute of limitations, ten years, 1193.
statutory provisions relating to foreclosure, 1364.
power of sale mortgages and trust deeds in, 1762.
WIFE, not bound by additions or blanks filled into mortgage without consent, 91, 95.
owning mortgage should sue alone, 1393.
of mortgagor when made a party to foreclosure suit, 1420–1422.
WISCONSIN, nature of a mortgage in, 57.
deed of trust not allowed in, 62.
authority to fill blanks, 90.
vendor's lien adopted in, 191.
parol evidence to show a mortgage, 320.
record of assignment not notice to mortgagor, 473.
provisions respecting registration in, 525.
provisions respecting mechanics' liens in, 524.
usury in, 633.
entry of satisfaction of record, 1036.
no redemption after foreclosure, 1051, 1365.

WISCONSIN — *continued.*
redemption barred in ten years in, 1147.
statute of limitations, twenty years, 1193.
statutory provisions relating to foreclosure, 1365.
strict foreclosure in, 1556.
power of sale mortgages and trust deeds in, 1763.
WITNESSES, requirements as to, 82, 532.
WOOD, growing, subject of mortgage, 145.
mortgagor may cut for his fires, 694.
WRIT OF ENTRY, mortgagee may recover possession by, 718.
(See FORECLOSURE BY, 1276–1316.)
WYOMING TERRITORY, record of assignment not notice to mortgagor, 473.
provisions respecting registration in, 526.
provisions respecting mechanics' liens in, 526.
usury in, 633.
entry of satisfaction of record, 1037.
statute of limitations, twenty-one years, 1193.
statutory provisions relating to foreclosure, 1366.